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THE TRIBAL NATIONS OF MONTANA

A Handbook for Legislators

March 1995

Prepared by

The Committee on Indian Affairs

Published by

Montana Legislative Council

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Prepared by

The Committee on Indian Affairs

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PREFACE

American Indians have a permanent place in the history, politics, culture, and economic development of the western states. In Montana, Indians from at least a dozen tribal groups compose the state's largest and fastest growing ethnic minority. Only Arizona and New Mexico contain more reservations than Montana's seven. The Indian nations of Montana are a living legacy. They are diverse in their history and cultural traditions. They remain relatively isolated in geographic terms, but not in other aspects. Indians in Montana have benefited from economic and social changes brought about by technology, education, commercial development, and other factors of modernization, but they have also suffered from the corrosive effects that these same changes have had on traditional ways of life. Indians and non-Indians are challenged by history and present circumstances to find common ground on which to build a happy and prosperous future for all Montana citizens.

The Legislature and various state government agencies have the opportunity to honor, and in some cases to help fulfill, binding commitments made to Indians in times past by Congress and the federal government. The 1972 Montana Constitution carried forward the 1889 provision from The Enabling Act explicitly acknowledging Congress's absolute control and jurisdiction over all Indian land, including state authority to tax the land, and forever disclaiming title to lands owned or held by or reserved for an Indian or for Indian tribes. Article X, section 1(2), of the 1972 Montana Constitution recognizes "the distinct and unique cultural heritage of the American Indians" and commits the state in its educational goals to "the preservation of their cultural integrity". Montana is alone among the 50 states in having made an explicit constitutional commitment to its Indian citizens.

State-tribal relations in Montana have been marked by periodic successes and recurrent misunderstandings. Indian and non-Indian people have coexisted in relative peace in Montana for the past century. The splendid Charles M. Russell painting in the House Chamber of the Capitol entitled "Lewis and Clark Meeting the Flathead Indians at Ross' Hole" symbolizes the coming together of disparate people under a much celebrated Big Sky

some 75 years before Montana became part of the United States. The surrender of Sioux Chief Sitting Bull after General Custer's defeat at the fateful Battle of the Little Bighorn in 1876 and the capture of Chief Joseph and the Nez Perce in the Bears Paw Mountains in 1877 marked the end of sporadic warfare between white settlers and indigenous peoples on the high plains. These events set the stage for the establishment of Indian reservations and the granting of U.S. (and state) citizenship in 1924 under the 14th amendment to the U.S. Constitution.

While both the federal constitution and the Montana Constitution, a panoply of federal and state laws, and numerous works of art and literature manifest a shared sense of purpose and belonging, there are still many instances of intercultural conflict that can cause hard feelings and lead to further alienation between citizens of different ancestry. At Montana State University's centennial celebration in the spring of 1994, the president of Little Big Horn Tribal College, Janine Pease Windy Boy, warned her audience about the potential for bitter clashes between the dominant and minority culture groups in Montana. We were mindful of that possibility while preparing this document. Our hope is that this handbook will contribute to harmonious relations between the Indian minority and the non-Indian majority of Montana citizens.

The purpose of this handbook is primarily educational--to raise the general level of knowledge and awareness of Indian nations among legislators, state government personnel, and other interested citizens of Montana, especially teachers and students. The handbook is not intended to be an exhaustive study of federal Indian law, nor is it intended to answer all questions relating to issues impacting Indians or tribes in Montana. We hope to offset myths and misconceptions with pertinent facts. We believe that accurate information provides a strong foundation for mutual respect and mutually rewarding relationships between people with different traditions, beliefs, and world views who nevertheless share common rights of citizenship and common aspirations for the state as a whole. There are numerous examples of formal and informal agreements between state government and tribal authorities, but there are also significant issues that remain unresolved and that warrant informed discussion.

The handbook does not take a partisan approach, nor does it include or advocate a specific legislative agenda. The handbook is modeled after a 1993 document published by the Minnesota House of Representatives entitled Indians, Indian Tribes and State Government.* We have chosen to combine short narrative sections with a question and answer format, similar to the one used in Jack Utter's American Indians: Answers to Today's Questions.

The handbook is divided into different subject areas for easy reference. The authors recognize that this method of organizing information has its advantages and disadvantages. While topical arrangements offer convenience, they also slight an important reality: the interconnectedness of almost all issues affecting the Indian nations of Montana and the other states. For example, questions of jurisdiction permeate many aspects of federal, state, and tribal relations, even though the subject of jurisdiction itself is explained only once in the handbook. It is increasingly clear that economic development is closely linked to the governance of natural resources and environmental protection, but these subjects are dealt with in separate sections. We trust that readers will take the somewhat artificial separation of issue areas into account and realize how politics, economics, education, and culture are interconnected for Indians and non-Indians alike.

A note on usage: We believe most Indian people prefer to be identified by their tribal affiliation when addressed as individuals or as a tribal group. For example, unless one is talking about all of the Indians in Montana, it is preferable to distinguish between Blackfeet, Assiniboine, Crow, and the others. Throughout the handbook, we've chosen to use the term "Indian" rather than the term "Native American" when referring to the racially and politically distinct population in general terms.

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* Indians, Indian Tribes and State Government, Research Department, Minnesota House of Representatives, February 1993.

MONTANA'S INDIAN TRIBES

INTRODUCTION

With the arrival of Lewis and Clark in the first decade of the 19th century, the traditional way of life of Montana Indians became increasingly threatened. By the mid-1880s, the federal government began to deal formally with the tribes, entering into treaties that assigned tribes to certain areas and obligated them to respect the land of their neighbors. However, the mining invasions of the 1860s disrupted these fragile arrangements as miners and others rushed into the prime gold fields that often lay along or within the designated tribal lands. These new inhabitants demanded federal protection, thus beginning the garrisoning of Montana and the eventual relocation of the tribes to smaller and smaller reserves.

The combination of "tribal" and "nation" best encapsulates essential aspects of both the historical and contemporary identity of Indian communities in Montana. There are nine principal tribal groups living on seven reservations in Montana. (See map for locations.) Three of the reservations are inhabited by more than one tribal group. The Confederated Salish, Pend d'Oreille, and Kootenai share the Flathead Reservation; the Gros Ventre and Assiniboine cohabit the Fort Belknap Reservation; and the Assiniboine and Sioux both reside on the Fort Peck Reservation. In each of these cases, the reservation population consists of fragments of larger tribal nations. For example, there are 33 bands of Assiniboine Indians, two of which are represented on the Fort Peck Reservation, where each of the seven primary bands of the Sioux nation are also represented. The Rocky Boy's Reservation was originally inhabited by members of the Chippewa and Cree Tribes. However, because of extensive intermarriage over the years, the tribal rolls list members only as "Chippewa Crees". In 1935, the Chippewa Crees adopted a tribal constitution for the "Chippewa Cree Tribe", officially recognizing the coming together of the two tribes into one. Montana is also home to the Little Shell Band of Chippewa, often referred to as "Landless Indians". Although a distinct tribal group, the Little Shell are not yet a federally recognized tribe.

Tribal nations are distinctive in several respects. They are based primarily (although not exclusively) on ethnic heritage and are racially distinct from other minority groups in Montana and the United States. Most important from a legislative standpoint, tribal nations have a unique status in the American federal system. American Indians are not JUST an ethnic minority; they are also members of quasi-sovereign tribal nations. The Indian nations of Montana are governed by tribal governments that are legally empowered to determine who is and is not a member of the nation. Each of the tribal governments in Montana has established its own criteria for enrollment, with some requiring higher blood quantum levels than others.

INDIAN POPULATION

According to the 1990 census, the Indian population in Montana was 47,679 persons, approximately 5.97% of the total population of the state. Of the Montana population 18 years of age and older, 4.8% is Indian. While Montana's overall population increased only 1.6% from 1980 to 1990, the Indian population increased by 27.9%.

These numbers are only one method of determining the number of Indians in the state. The numbers do not necessarily match the number of persons who appear on tribal rolls or the number of persons that tribes or federal or state agencies consider to be Indian. The concept of race as used by the U.S. Bureau of the Census reflects self-identification. The data for race represents self-classification by people according to the race with which they most closely identify.

Data on American Indians, Eskimos, and Aleuts is combined when reported and includes persons who report their race as one of the three categories. The Bureau of the Census uses the term "American Indian" and includes persons who indicated their race as American Indian, entered the name of an Indian tribe, or entered Canadian-Indian, French-American Indian, or Spanish-American Indian. The term "Eskimo" includes persons who indicated their race as Eskimo or entered other names, such as Arctic Slope, Inupiat, or Yupik. The term "Aleut" includes persons who indicated their race as Aleut or entered other terms, such as Alutiiq, Egegik, or Pribilovian.

The census reports information for American Indian areas that includes all American Indian reservations, off-reservation trust lands, and other tribal-designated statistical areas. Montana has seven Indian areas. The Indian population ranges from 24% of the total population in the Flathead area to 96% in the Rocky Boy's area.

TABLE 1

Indian Population in Montana
by U.S. Bureau of the Census American Indian Areas

AMERICAN INDIAN AREA	AMERICAN INDIAN POPULATION	TOTAL POPULATION	AMERICAN INDIAN PERCENTAGE
Blackfeet	7,025	8,549	82
Crow and Trust Lands	4,724	6,370	74
Flathead	5,130	21,259	24
Fort Belknap and Trust Lands	2,338	2,508	93
Fort Peck	5,782	10,595	55
Northern Cheyenne and Trust Lands	3,542	3,923	90
Rocky Boy's and Trust Lands	1,882	1,954	96

Source: U.S. Bureau of the Census (1990)

Although the Indian population in Montana is highly concentrated in a few counties, Indians live in all 56 counties of the state, ranging from a small percentage of less than 1% in 19 counties to 1% to 10% of the population in 29 counties. There are eight counties in which Indians compose from 11% to 56% of the total population.

TABLE 2

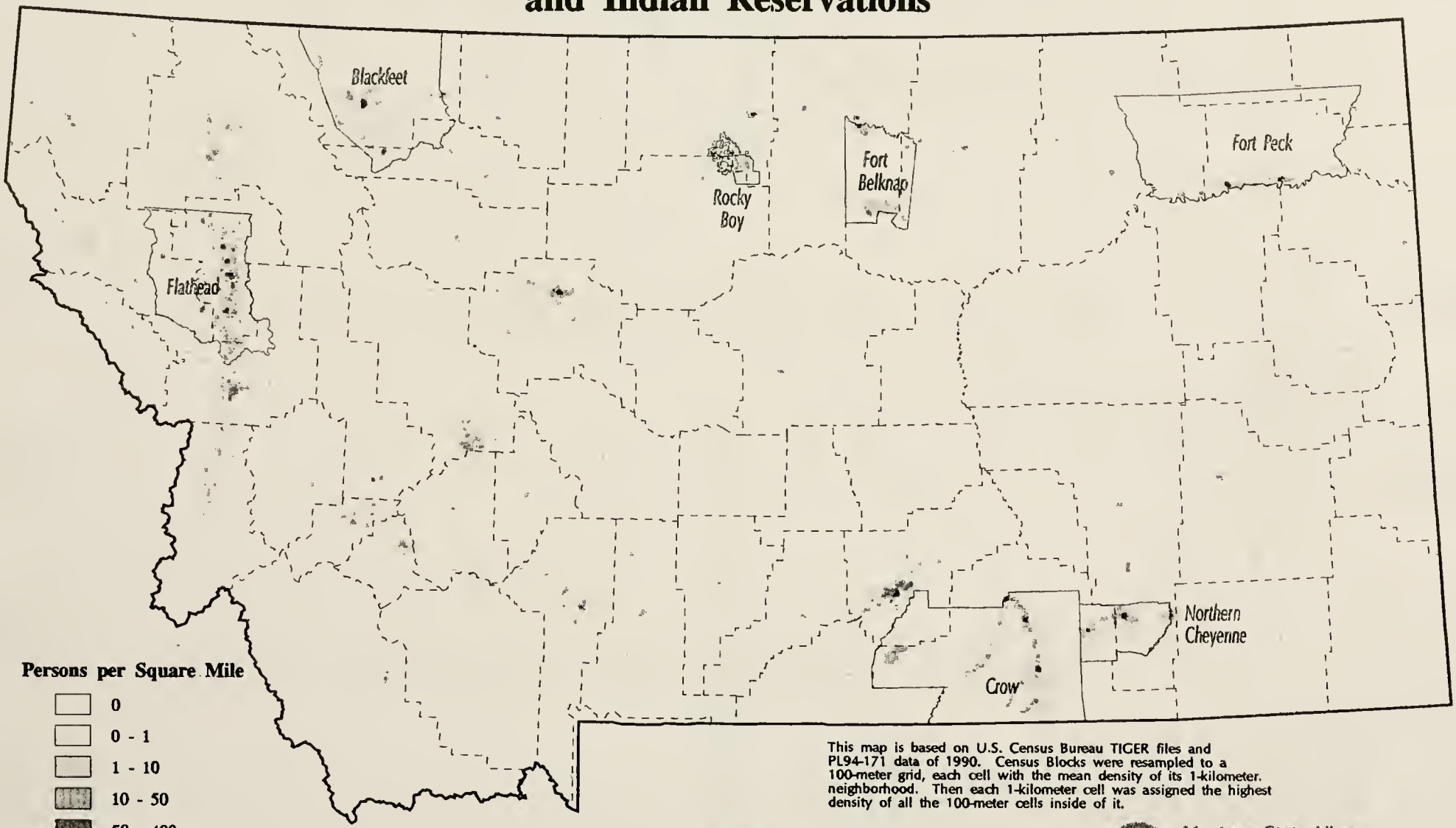
Indian Population in Montana by County

County	1990 Population	Percentage of Total County Population
Beaverhead	121	1.4
Big Horn	6,289	55.5
Blaine	2,664	39.6
Broadwater	45	1.3
Carbon	42	0.5
Carter	9	0.6
Cascade	3,072	3.95
Chouteau	212	3.9
Custer	196	1.7
Daniels	6	0.3
Dawson	83	0.8
Deer Lodge	260	2.5
Fallon	9	0.3
Fergus	121	1.0
Flathead	880	1.5
Gallatin	608	1.2
Garfield	4	0.25
Glacier	6,823	56.0
Golden Valley	10	1.0
Granite	21	0.8
Hill	2,769	16.0
Jefferson	118	1.5
Judith Basin	7	0.3
Lake	4,498	21.0
Lewis and Clark	1,059	2.2
Liberty	11	0.5
Lincoln	282	1.6
McCone	17	0.7
Madison	43	0.7
Meagher	18	0.99
Mineral	79	2.4
Missoula	1,818	2.3
Musselshell	26	0.6
Park	113	0.77
Petroleum	3	0.58
Phillips	390	7.5

Pondera	704	11.0
Powder River	37	1.7
Powell	253	3.8
Prairie	15	1.1
Ravalli	287	1.1
Richland	140	1.3
Roosevelt	5,355	48.7
Rosebud	2,807	26.7
Sanders	471	5.4
Sheridan	50	1.0
Silver Bow	520	1.5
Stillwater	52	0.8
Sweet Grass	16	0.5
Teton	93	1.5
Toole	118	2.3
Treasure	9	1.0
Valley	770	9.3
Wheatland	19	0.8
Wibaux	2	0.1
Yellowstone	3,235	2.85
Montana	47,679	5.97

Source: U.S. Bureau of the Census (1990)

Montana Indian Population Density and Indian Reservations



Persons per Square Mile

- 0
- 0 - 1
- 1 - 10
- 10 - 50
- 50 - 400
- over 400

This map is based on U.S. Census Bureau TIGER files and PL94-171 data of 1990. Census Blocks were resampled to a 100-meter grid, each cell with the mean density of its 1-kilometer. neighborhood. Then each 1-kilometer cell was assigned the highest density of all the 100-meter cells inside of it.

Scale of Miles
0 20 40 60 80 100 120 140 160

Montana State Library
NRIS Natural Resource Information System
Map #95nris63 - November 29, 1994

REAPPORTIONMENT

Reapportionment occurred following the 1990 census and resulted in an increase in legislative districts in which Indians compose more than 50% of the population: from a single House district following the reapportionment based on the 1980 census to four House districts and one Senate district following the reapportionment based on the 1990 census. Although the districts are composed of more than 50% Indians, a higher percentage of that population is under 18 years of age than in the total population.

The 15th amendment to the U.S. Constitution has, since 1870, guaranteed the right to vote to all citizens, regardless of race, color, or the previous condition of servitude. That right was not clearly outlined or enforced until the Voting Rights Act of 1965, which was further amended in 1970, 1975, and 1982. The 1975 amendments extended protection against denial or abridgment of the right to vote to "language minority groups", including Indians, in addition to traditionally recognized minority groups that are identified by race or color.

Reapportionment in the 1990s resulted in a moderate gain in the protection of minority voting rights for Indians in Montana, although the first election cycle since reapportionment did not result in greater Indian representation. If Indian population continues to outpace the total population in the amount of increase, the 2000 census and subsequent reapportionment may result in stronger Indian majority districts and increased Indian participation in the state Legislature.

TABLE 3

Summary of Indian Majority/Influence Districts

RESERVATION	COUNTIES	AMERICAN INDIAN POPULATION	PERCENTAGE OF TOTAL DISTRICT POPULATION	PERCENTAGE OF VOTING AGE POPULATION(18 and older)
Blackfeet (HD 85)	Glacier	5,632	69.65	66.36
Rocky Boy's and Fort Belknap (HD 92)	Hill and Blaine	4,660	58.82	52.37
Fort Peck (HD 98)	Roosevelt	4,973	61.11	55.23
Northern Cheyenne and Crow (HD 5)	Big Horn and Rosebud	4,307	56.72	49.74
Crow (HD 6)	Big Horn and Yellowstone	4,555	59.75	53.00
Flathead (HD 73)	Lake	2,515	30.63	27.95
Crow and Northern Cheyenne (SD 3)	Big Horn, Rosebud, Yellowstone	8,862	58.24	51.40

Source: Montana Legislative Council, based on the 1990 census

STATE-TRIBAL RELATIONS

In 1951, the Montana Legislature created the position of Coordinator of Indian Affairs in recognition of the need to provide a way for American Indians to communicate with state government. The coordinator serves as a spokesperson for Indian tribes and actively assists them in their efforts to work with state agencies.

The coordinator is appointed by the Governor from a list a five qualified Indian applicants agreed upon by the tribal councils of the Indian tribes of the state. The coordinator serves on numerous advisory councils in order to represent Indians in those areas in which representation is needed. The coordinator also works with state agencies involved in state-tribal negotiations on issues such as tax-sharing agreements and gaming compacts.

In recognition of the need to provide a way for Indians to communicate their needs and concerns to the Legislature, the Legislature established the Committee on Indian Affairs. The Committee was first established in the late 1970s as a temporary committee to study issues of jurisdiction. The Committee was re-established by the Legislature every 2 years until 1989, when it became a permanent committee of the Legislature.

The Committee is composed of eight members, equally divided between the House of Representatives and the Senate and between political parties. The Committee works to promote better understanding between Indians and non-Indians; to encourage state-tribal and tribal-local government cooperation; to act as a liaison between the Indian people and the Legislature; and to gain insight into Indian/non-Indian relations. This handbook is an example of the kind of work undertaken by the Committee.

In 1981, in recognition of the government-to-government relationship and to promote cooperation, the Legislature enacted the State-Tribal Cooperative Agreements Act (Title 18, chapter 11, part 1, MCA) that authorizes public agencies, including cities, counties, school districts, and other agencies or departments of the state, to enter into cooperative agreements with Montana's tribal governments. To date, over 500 agreements, relating to a variety of governmental services, have been negotiated and completed.

SUMMARY

The combination of demographic data and historical facts leads us to a conclusion of sorts at the outset of this handbook: American Indians are very much a part of Montana's social fabric, political culture, and economic future. Tribal nations roamed across or settled in every region of what is now the State of Montana for hundreds and probably thousands of years.

Currently, Indians live in all 56 counties of the state, although some counties have a much higher population of Indians than do other counties.

BASIC PRINCIPLES OF STATE-TRIBAL RELATIONS

Indians are not just members of an ethnic minority group in Montana.

Most Indians are also members of distinct cultural nations with a special political and legal status that has been enshrined in the U.S. Constitution, bolstered by subsequent federal laws, and affirmed by the courts.

Tribal governments are not subordinate to state governments and are not bound by state laws.

With rare exceptions, a state has jurisdiction within a reservation only to the extent that Congress has delegated specific authority to it or in situations in which neither federal nor tribal law preempt state law.

There is always a federal dimension to consider in formal state-tribal interactions.

Tribal governments are subordinate to Congress. In many arenas of governance, including economic development, environmental regulation, and law enforcement, tribal authorities require authorization, appropriations, and approval from the Secretary of the Interior or lower-ranking officials of the Interior Department's Bureau of Indian Affairs (BIA).

Federal Indian policy is generally consistent in some aspects and remarkably inconsistent in others.

The separation of powers allows the coexistence of contrasting views and contradictory decisions. Even though every U.S. President since President Nixon has espoused self-determination as a guiding principle, Congress has both broadly encouraged self-government and in some instances prescribed in detail the manner in which tribes may use their self-governing authority. Federal and U.S. Supreme Court decisions have see-sawed between supporting and limiting the sovereignty of Indian nations.

The Indian nations of Montana are similar in some general respects, but distinct from each other in many important ways.

Although "Indian country" is a useful phrase when considering federal laws and policies applicable to all Indian nations, each nation is unique, with different priorities, values, cultural attributes, and economic circumstances. The distinctions between different Indian nations in Montana need to be considered in discussions and negotiations between the state government and tribal governments.

Government-to-government relations are the norm, not the exception.

Protocol is important. The use of proper channels demonstrates mutual respect and lends dignity to relationships that are often delicate and easily tainted by misunderstanding and the suspicion that state (or federal) bureaucrats are attempting to interfere with internal disputes of tribal government officials.

The leaders and other members of Indian nations are generally wary of state government.

Western American history is peppered with examples of coercion, massacres, broken treaties, disingenuous overtures of peace and friendship, disrespect, and attempts to assert rights and usurp powers in contravention of federal law and policy.

DEFINITION OF "INDIAN" AND "INDIAN TRIBE"

Who is an Indian?

There is no single definition of "Indian". In attempting to define the term, it is important to keep in mind the differences between tribal membership, federal law, and ethnological status. A person may not be considered an Indian ethnologically but may qualify for certain programs or services under a federal definition or may qualify for tribal membership under tribal enrollment rules.

As a general rule, however, there are two qualifications for a person to be considered an Indian:

(1) the person has some Indian blood; and

(2) the person is recognized as an Indian by members of an Indian tribe or community.

Federal law defines "Indian" in many different ways. The Bureau of the Census defines Indians as individuals who identify themselves as Indians. The BIA generally defines an Indian as a person who:

(1) is a member of a tribe recognized by the federal government;

(2) lives on or near a reservation; and

(3) is one-quarter or more Indian ancestry.

The Indian Education Act of 1988 uses a much broader definition that encompasses people of one-eighth Indian ancestry, self-identified Indians, residents of state reservations, and urban Indians.[1]

The Indian Arts and Crafts Act of 1990 says "member of an Indian tribe, or . . . is certified as an Indian artisan by an Indian tribe".[2]

Tribes, as self-governing entities, have the power to determine tribal membership. Membership can refer to the formal enrollment on the tribal roll of a federally

recognized Indian tribe or to a more informal status as a recognized member of a tribal community. Qualifications for formal membership differ from tribe to tribe. Tribal enrollment is the best evidence of a person's Indian status because it is a common prerequisite for acceptance as a member of a tribal community.

What is the correct term to use when referring to American Indians?

This question has been the subject of much debate. The preference is to use individual tribal affiliations whenever possible However, the terms "Indian", "American Indian", or "Native American" are acceptable, although the term "Native American" can properly apply to anyone born in America.

Are Indians United States citizens?

Yes. All Indians born in the United States, or born of citizens who are outside the country at the time of birth, are American citizens, with all of the attendant rights and responsibilities. Indians are also citizens of the states in which they reside. However, U.S. citizenship was not generally conferred on Indians until 1924. Before that time, some treaties or allotment acts had extended citizenship to individual Indians.

In addition, Indians are citizens or members of tribes. American citizenship is not inconsistent with tribal membership, nor does American citizenship affect the special relationship that exists between tribes and the federal government.

What is an Indian tribe?

There is no all-purpose definition of an Indian tribe. There is a legal-political identity that is determined by federal law. There is also an ethnological identity.

A general definition offered by William Canby, Jr., in American Indian Law, is "a group of Indians recognized as constituting a distinct and historically continuous political entity for at least some governmental purpose". The key word in this definition is "recognized". The most important and valuable recognition is that of the federal government.

What is meant by "federal recognition" of an Indian tribe?

Federal recognition means the existence of a special relationship between the federal government and a particular tribe that may confer specific benefits and services on that tribe as enumerated in various federal laws. Recognition also means that the recognized tribe has certain inherent rights and powers of self-government but is also subject to the broad powers that Congress has in dealing with Indian tribes.

Recognition usually comes from a treaty, statute, or executive or administrative order or from the course of dealing with a tribe as a political entity. However, federal recognition does not necessarily follow ethnological divisions. Separate ethnological tribes can be combined into one legal tribe, e.g., the Confederated Salish and Kootenai Tribes on the Flathead Reservation. Also, one ethnological tribe can be divided into separate legal tribes, e.g., the Assiniboine and Sioux Tribes at Fort Peck and the Gros Ventre and Assiniboine Tribes at Fort Belknap.

In 1978, the Department of the Interior adopted regulations creating an administrative procedure to be followed by tribes seeking acknowledgment, which is basically the same as recognition. Formal "recognition" is generally the prerogative of Congress and the President. A tribe may seek formal recognition of its status directly from Congress.

There are two essential elements for recognition or acknowledgment:

(1) a group exercises some sort of governmental authority over its members; and

(2) a group occupies a specified territory or inhabits a community viewed as distinctly Indian.

How many tribes in Montana have federal recognition?

There are seven federally recognized tribes in Montana. They are the Crow Tribe, the Northern Cheyenne Tribe, the Blackfeet Tribe, the Chippewa Cree Tribe, the Confederated Salish and Kootenai Tribes, the Assiniboine and Sioux Tribes, and the Gros Ventre and Assiniboine Tribes.

Are there any tribes in Montana not officially recognized by the federal government?

Yes, the Little Shell Band. Composed of Chippewa and Cree Indians, the Little Shell were shut out of reservations in North Dakota and Montana for various reasons. Today, the tribal members live all over Montana but have an elected tribal council and an executive officer. The Little Shell are currently in the process of seeking federal recognition from the Department of the Interior.

ENDNOTES

1. 25 U.S.C. § 2651.
2. 25 U.S.C. § 305(e).

DEFINITION OF "INDIAN COUNTRY"

What is "Indian country"?

Indian country includes:

(1) all land within the limits of an Indian reservation under the jurisdiction of the United States government;

(2) all dependent Indian communities, such as the New Mexico Pueblos; and

(3) all Indian allotments still in trust, whether they are located within reservations or not.[1]

The term includes land owned by non-Indians, as well as towns incorporated by non-Indians if they are within the boundaries of an Indian reservation.

It is generally within these areas that tribal sovereignty applies and state power is limited.

What is the difference between Indian country and an Indian reservation?

A reservation is an area of land "reserved" by or for an Indian band, village, or tribe (tribes) to live on and use. Reservations were created by treaty, by congressional legislation, or by executive order. Since 1934, the Secretary of the Interior has had the responsibility of establishing new reservations or adding land to existing reservations.

Indian country encompasses reservations.

What is the ownership status of land within Indian country?

There are three basic categories of land tenure in Indian country: **tribal trust lands, allotted trust lands, and fee lands.**

Tribal trust lands are held in trust by the United States government for the use of a tribe. The United States holds the legal title, and the tribe holds the beneficial interest. This is the largest category of Indian land. Tribal trust land is held communally by the tribe and is managed by the tribal government. Tribal members share in the enjoyment of the entire property without laying claim to individual parcels. The tribe may not convey or sell trust land without the consent of the federal government. Tribes may acquire additional land and have it placed in trust with the approval of the federal government.

Allotted trust lands are held in trust for the use of individual Indians (or their heirs). Again, the federal government holds the title, and the individual (or heirs) holds the beneficial interest.

During the assimilation period, Congress enacted the General Allotment Act of 1887, also known as the Dawes Act.[2] The ultimate purpose of the Dawes Act was to break up tribal governments, abolish the reservations, and assimilate Indians into non-Indian society as farmers. To accomplish this goal, Congress decided to divide tribal lands into individual parcels, give each tribal member a parcel, and sell the "surplus" parcels to non-Indian farmers.

The Act authorized the President to allot reservation land to individual Indians. Title to the land remained in the United States in trust for 25 years, or longer if extended by the President, then was conveyed to the Indian allottee in fee, free of all encumbrances. The trust period was intended to protect the allottee from immediate state taxation and to allow an opportunity to learn farming. Upon receiving the allotments (or after amendments in 1906 for fee title), allottees became U.S. citizens and were subject to state criminal and civil law. The Dawes Act also authorized the Secretary of the Interior to negotiate for acquisition by the United States of the so-called "excess" or "surplus" lands remaining after allotment. These "surplus" lands were to be opened to non-Indian settlement.

Although the sponsors of the Dawes Act believed that it would help Indians prosper, the effect on Indians and Indian lands was catastrophic. Most Indians did not want

to abandon their culture to pursue farming. Because much of the land allotted to Indians was unsuitable for small-scale farming, Indians sold their parcels to settlers or lost land in tax foreclosure when, upon receiving a patent after 25 years, the land was subjected to state taxes.

The result was a checkerboard pattern of land ownership within many reservations that were allotted either under the Dawes Act or under other specific allotment acts, with much of the allotted land passing out of trust status and Indian ownership. While not all reservations were allotted, the effect was still devastating as the total amount of Indian-held land declined from 138 million acres in 1887 to 48 million acres in 1934 when the allotment system was abolished.

Fee lands are held by an owner, whether Indian or non-Indian.

Other lands in Indian country can be held by federal, state, or local (nontribal) governments. These lands include such areas as national wildlife refuges and state parks.

What is the ownership status of land within Montana's seven reservations?

RESERVATION	TOTAL ACREAGE	% TRUST LANDS (tribal & individual)	% FEE LANDS (non-Indian & federal & state government)
Blackfeet	1.5 million	65	35
Crow	2.3 million	68	32
Flathead	1.2 million	52	48
Fort Belknap	650,000	96	4
Fort Peck	2.1 million	44	56
Northern Cheyenne	445,000	98	2
Rocky Boy's	108,000	100	0

Source: Montana Indians: Their History and Location, Office of Public Instruction, March 1989

Were lands on Montana reservations allotted?

In most instances, yes. The only reservation that was not allotted was Rocky Boy's Reservation. The Fort Belknap and Northern Cheyenne Reservations were allotted, but the surplus lands were not put up for sale to non-Indians. The Blackfeet Allotment Act was repealed 12 years after it was passed, and the surplus lands were returned to the tribe. The Flathead Reservation was specifically allotted under the Flathead Allotment Act,[3] which has been amended more than 80 times since 1904. On those reservations that were allotted, many of the allotted lands passed out of Indian control through sale to non-Indians or through loss to taxation.

ENDNOTES

1. 18 U.S.C. § 1151.
2. 24 Stat. 388, as amended, 25 U.S.C. §§ 331 through 358.
3. 33 Stat. 302 (1904).

INTERPRETATION OF INDIAN LAW

Are the rules for interpreting Indian law different from those used to interpret other laws?

Yes. From the early 1800s, the United States Supreme Court, in numerous decisions, held that the federal government had a special **trust responsibility** with Indian tribes.[1] From this trust relationship, the Court also developed and used a unique set of rules, commonly known as "**canons of construction**", for interpreting or construing treaties, statutes, or executive orders that affected Indian tribes and peoples.

These canons of construction acknowledged the existence of the unequal bargaining positions that existed between the federal government and the tribes during negotiations. In many cases, tribal negotiators did not speak or understand English and were, therefore, placed at a significant disadvantage during the negotiation process. Often, the federal government negotiated with individuals whom it had selected and who were not the traditional leaders of a particular tribe.

More importantly, these canons reflect a presumption, based on this federal trust responsibility, that an act of Congress was meant to protect tribes and Indian peoples. As a result, these canons assume that unless there is a "clear purpose" or an "explicit statement" to the contrary in treaties, statutes, or executive orders, Congress intended to preserve or maintain the rights of tribes.

Specifically, these canons provide that the treaties, statutes, orders, or agreements with Indian tribes are to be construed liberally in favor of Indians. If ambiguities exist, they are to be resolved in favor of Indians.[2]

Can the abrogation of tribal rights be presumed under the canons?

No. Unless Congress clearly indicates through a treaty or legislation or in an agreement that rights are extinguished or altered, it is presumed that all tribal rights are retained.[3] Congress must demonstrate a clear purpose to abrogate tribal rights.[4]

ENDNOTES

1. See, e.g., Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

2. See Cohen, Felix, Handbook of Federal Indian Law (1982), pp. 221-225 for discussion of canons.

3. Menominee Tribe v. United States, 391 U.S. 404 (1968).

4. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

TRIBAL SOVEREIGNTY AND STATE POWER

What is tribal sovereignty?

Although sovereignty is often loosely defined, it refers to the inherent right or power to govern a people and a territory. When Europeans arrived in North America, tribes conducted their own affairs and depended upon no outside authority. Both the colonial powers and later the federal government recognized the sovereign status of tribes by treating them as foreign nations and leaving them to regulate their own affairs. At the same time, Europeans also claimed dominion over all new world territories. The issue was left to the United States Supreme Court to resolve.

Chief Justice Marshall described the federal-tribal relationship as one of "domestic dependent nations" to whom the federal government had a fiduciary relationship.[1] At the same time, the Chief Justice declared:

> The Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and the acts of Congress.[2]

Through the years, however, the federal government's Indian policy has appeared somewhat schizophrenic, shifting from protection to termination in the 1950s to encouraging self-determination since the 1970s.

If the U.S. Constitution prohibits discrimination based on race, why do Indians retain special rights not held by other citizens in the United States?

The special status of Indian tribes predates the U.S. Constitution and federal law. When the United States was founded, tribes were self-governing and sovereign nations whose powers were not extinguished by the constitution. The constitution may have subjected the tribes to federal power, but it did not extinguish tribal internal sovereignty or subject them to the powers of the states.[3]

The different treatment of Indians and non-Indians is allowed because Indians are a separate political group. The United States did not enter into treaties with Indians because of their race, but rather because of their political status. Congress treats Indians and non-Indians differently because the Commerce and Treaty Clauses of the U.S. Constitution authorize Congress to do so.

Were treaties necessary to grant certain powers to Indian tribes?

No. Many mistakenly believe that a treaty contains those rights that the federal government **granted to** a tribe. As recognized by both the United States and the Montana Supreme Courts, a treaty is not a grant of rights to the Indians, but instead is a grant of rights **from** Indians.[4]

Indian treaties stand on essentially the same footing as treaties with foreign nations. Because they were made pursuant to the U.S. Constitution, treaties take precedence over conflicting state law because of the Supremacy Clause of the U.S. Constitution.[5]

What tribes lost with adoption of the U.S. Constitution was "external sovereignty" or the ability to interact with foreign nations. Similar to states, tribes retained sovereignty within tribal territories and retained the power of self-government with respect to their land and members.[6]

Does the United States government still make treaties with Indians?

No. Treaty negotiations with Indian tribes ended with an act of Congress in 1871.[7] However, the act did not impair or abolish existing treaty obligations. Since that time, agreements with tribes have been made by congressional acts, executive order, and executive agreements.

Can treaties with tribes be abrogated?

Yes. Congress maintains the power to unilaterally abrogate Indian treaties.[8] Because many treaties often contained language stating that they would remain in effect "as long as the grass shall grow" or similar terms, many incorrectly believe

that changes in terms must be mutually negotiated by the federal government and the tribes. That is not the case. Treaties, like international treaties, are similar to federal statutes. They can be repealed or modified by later federal statutes.

Can abrogation of treaties be implied by passage of other acts?

No. The trust relationship between the federal government and Indians tribes weighs heavily against implied abrogation of treaties.[9] It must be clear that Congress considered the conflict between its intended action and a treaty and chose to resolve that conflict by abrogating the treaty.[10]

Congress's power to abrogate a treaty does not free it from the duty to compensate for the destruction of a property right. Although an abrogation itself may be effective, a tribe may have a "takings" claim under the fifth amendment.[11]

Can Montana unilaterally enact legislation affecting jurisdiction?

No. The Indian Commerce Clause of the U.S. Constitution gives Congress, not the states, plenary or absolute authority over Indian tribes. Only Congress can repeal treaties, eliminate reservations, or grant the states jurisdiction over Indians on reservations. The actions of the federal government are controlled by the rights guaranteed through the Bill of Rights and the 14th amendment to the U.S. Constitution. A state only has the power over Indian affairs within Indian country that Congress specifically grants it. A state only has power in Indian country if Congress has delegated power to it or if the exercise of state authority is not preempted.

ENDNOTES

1. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

2. Worcester v. Georgia, 31 U.S. 515 (1832).

3. The United States Constitution recognizes the unique status of Indian tribes in Article I, § 8, commonly referred to as the "Indian commerce clause", which grants Congress authority "*[t]o regulate commerce with* foreign nations, and among the several states, and with *the Indians tribes*". (emphasis added)

4. United States v. Winans, 198 U.S. 371 (1905); State v. McClure, 127 Mont. 534, 268 P.2d 629 (1954); State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985).

5. United States Constitution, Article VI, § 2; Worcester v. Georgia, 31 U.S. 515 (1832). Treaties are the supreme law of the land and are superior to any conflicting laws of a state, including the police powers of a state. U.S. v. Forty-Three Gallons of Whiskey, 108 U.S. 491 (1883); State v. McClure, 127 Mont. 534, 268 P.2d 629 (1954).

6. See Worcester v. Georgia, 31 U.S. 515 (1832).

7. In 1871, Congress passed a rider to an Indian appropriations act, providing: "No Indian nation or tribe ... shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty...." 25 U.S.C.A. § 71.

8. United States v. Winans, 198 U.S. 371, 380-381 (1905).

9. Menominee Tribe v. United States, 391 U.S. 404 (1968).

10. United States v. Dion, 476 U.S. 734, 738-740 (1986); see also Seneca Nation of Indians v. Brucker, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959).

11. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); but cf, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), in which the Court held that rights based solely on aboriginal title are not compensable. The Court explicitly distinguished property rights based solely on aboriginal rights, which are not compensable, from treaty rights based on congressional acts, which are compensable. Id. at 277-278, 288-289; see also United States v. Creek Nation, 295 U.S. 103 (1935).

PUBLIC LAW 83 - 280

What is Public Law 83-280?

The years between 1953 and 1968 were known as the "termination" era in federal-tribal relations. During this period, Congress's goal was to assimilate Indians into the white culture and reduce the federal government's assistance to Indians.

During this time and in response to a perceived need to strengthen law enforcement on some Indian reservations, Congress enacted **Public Law 83-280**, commonly referred to as P.L. 280.[1] The act mandated that, initially, five states assume criminal and civil jurisdiction over most of the reservation lands within their borders.[2] Alaska became the sixth mandatory state in 1958. Reservations that were considered to have well-functioning law enforcement in these six states were exempted from P.L. 280. **Montana was <u>not</u> included in the "mandatory" states.**

Public Law 280 also authorized the other 44 states, at their option, to assume the same jurisdiction that mandatory states had received.[3] Of the 44 "optional states", only 10 took steps to assume jurisdiction under P.L. 280.

Has P.L. 280 been amended?

Yes. Between 1953 and 1968, states were allowed to assume jurisdiction unilaterally. Most tribes strongly opposed P.L. 280 when passed because they feared that optional states could increase their jurisdiction at will. In response to these tribal concerns, Congress amended P.L. 280 in 1968 to place a tribal consent requirement in the law and to authorize the United States to accept a "retrocession" or the return of jurisdiction acquired by a state under P.L. 280.

Did Montana participate in P.L. 280?

Yes. In 1963, the Montana Legislature passed legislation that allowed the state to assume "280" jurisdiction over tribal members on the Flathead Reservation.[4] The legislation also allowed the state to assume jurisdiction over other Indian tribes if

those tribes requested it.[5] The bill also provided a method for tribes to withdraw their approval to P.L. 280 jurisdiction.[6]

Did a Montana tribe consent to be subject to P.L. 280?

Yes, but only one. The Confederated Salish and Kootenai Tribes of the Flathead Reservation supported the legislation enacted in 1963. In 1965, the tribes enacted a tribal ordinance defining the scope and terms under which the tribes agreed to come under P.L. 280 jurisdiction.[7] The Governor of Montana then issued a proclamation providing for state assumption of jurisdiction as defined in the tribal ordinance.[8]

In 1993, at the request of the Confederated Salish and Kootenai Tribes, the Legislature enacted Senate Bill No. 368 that allowed for **partial retrocession** from P.L. 280.[9]

In September of 1994, the tribes entered into a memorandum of agreement, pursuant to the State-Tribal Cooperative Agreements Act, with the State of Montana; Flathead, Lake, Missoula, and Sanders Counties; and the cities of Hot Springs, Ronan, and St. Ignatius to implement Senate Bill No. 368, allowing the tribes to reassume **exclusive jurisdiction** over **misdemeanor crimes committed by Indians** and providing for continued **concurrent state-tribal jurisdiction over felony crimes committed by Indians.** The tribes' resolution to withdraw from P.L. 280 provides for cooperation between state, tribal, and local law enforcement agencies and includes language allowing continued state misdemeanor criminal jurisdiction in limited areas, such as a guilty plea entered in state court, pursuant to a plea bargain agreement that reduces a felony crime to a misdemeanor, or in the case of a conviction in state court on a lessor included offense in a felony trial. For felonies committed by Indians, both the state and tribes retain concurrent jurisdiction, but either may transfer prosecution to the other if consideration of the factors specifically outlined in the agreement warrants transfer.

Montana's other six tribal governments have never been, and are not presently, subject to P.L. 280.

ENDNOTES

1. Public Law 280, 67 State. 588 (1953).

2. The "mandatory" states include **all Indian country in California and Nebraska**; all Indian country in **Minnesota, except the Red Lake Reservation**; all Indian country in **Oregon, except the Warm Springs Reservation**; and all Indian country in **Wisconsin, except the Menominee Reservation.**

3. Ten option states accepted jurisdiction under P.L. 280. Only Florida accepted the full jurisdiction given mandatory states. The other nine, including Montana, undertook partial jurisdiction. The 10 "optional" states included **Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.**

4. House Bill No. 55, (Chapter 81, L. 1963), codified at sections 2-1-301 through 2-1-306, MCA. Section 2-1-301, MCA, provides:

> The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd congress, 1st session).

5. Section 2-1-302, MCA, provides:

> (1) Whenever the governor of this state receives from the tribal council or other governing body of the Confederated Salish and Kootenai Indian tribes or any other community, band, or group of Indians in this state, **a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction, or both, of the state to the extent authorized by federal law and regulation, he shall issue within 60 days a proclamation to the effect** that such jurisdiction applies to those Indians and their territory or reservation in accordance with the provisions of this part.
>
> (2) The governor may not issue the proclamation until the resolution has been approved in the manner provided for by the charter, constitution, or other fundamental law of the tribe or tribes, if said document provides for such approval, and there has been first obtained the consent of the board of county commissioners of each county which encompasses any portion of the reservation of such tribe or tribes. (emphasis added)

6. Prior to 1993, section 2-1-306, MCA, provided:

> Any Indian tribe, community, band, or group of Indians that may consent to come within the provisions of this part may within 2 years from the date of the governor's proclamation withdraw their consent to be subject to the criminal and/or civil jurisdiction of the state of Montana, by appropriate resolution, and within 60 days after receipt of such resolution, the governor shall issue a proclamation to that effect.

7. Ordinance 40-A (revised) was enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes in 1965. The ordinance authorized the state to assume concurrent jurisdiction over tribal members for all criminal laws and eight areas of civil law: compulsory school attendance; public welfare; insanity; care of the infirm, aged, and afflicted; juvenile delinquency and youth rehabilitation; adoption (with tribal court approval); abandoned, dependent, neglected, orphaned, or abused children; and operation of motor vehicles on public roads.

8. The proclamation states: "By the power vested in me, as Governor of the State of Montana, I, Tim Babcock, hereby proclaim that criminal and civil jurisdiction of the State of Montana and its subdivisions does extend to The Confederated Salish and Kootenai Tribes as expressed in their approved Ordinance No. 40-A (Revised), and I further declare that sixty days from the date of October 8, 1965, such criminal and civil jurisdiction as previously described shall be in full force and effect."

9. In 1993, section 2-1-306, MCA, was amended to provide:

(1) No sooner than 6 months after April 24, 1993, and after consulting with local government officials concerning implementation, the Confederated Salish and Kootenai tribes may, by tribal resolution, withdraw consent to be subject to the criminal misdemeanor jurisdiction of the state of Montana. Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect.

(2) The Confederated Salish and Kootenai tribes may, by separate resolution, withdraw consent to be subject to those areas of civil jurisdiction of the state of Montana that are delineated in tribal ordinance 40-A (revised and enacted May 5, 1965). The withdrawal is limited to those delineated areas of civil jurisdiction agreed upon in writing by the governor after consultation with the attorney general and officials of affected local governments. The tribes shall initiate this process by sending a certified letter to the governor. After consultation and execution of a written agreement between the governor and the tribes, the agreed-upon civil areas must be incorporated into a tribal resolution to be enacted by the tribes. Within 6 months after receipt of the tribal resolution, the governor shall issue a proclamation to that effect that reflects the terms of the written agreement.

(3) Subsections (1) and (2) do not alter the existing jurisdiction or authority of the Confederated Salish and Kootenai tribes or the state of Montana, except as expressly provided for in subsections (1) and (2).

CIVIL JURISDICTION IN INDIAN COUNTRY

Although criminal jurisdiction is used to maintain law and order, civil jurisdiction is used to regulate matters such as taxes, domestic relations, child custody, probate, zoning, and traffic accidents.

Early in America's history, the question of jurisdiction in Indian country was answered by the United States Supreme Court in 1832 quite simply: **"State laws can have no force in Indian country without the approval of Congress."**[1] This test was simple and totally geographic.

When states continued to assert control without congressional approval, the Supreme Court developed parallel tests to determine which state laws can be enforced in Indian country without congressional consent: **the infringement test and the federal preemption test.** Additionally, a state law affecting reservation activities must be viewed against a "backdrop" of tribal sovereignty, a tribe's inherent right to be self-governing.

What is the infringement test, and how is it applied?

In 1959, the Supreme Court modified its earlier absolute test and ruled that without congressional authority, *a state may not infringe "on the right of reservation Indians to make their own laws and be ruled by them"*.[2] This principle, commonly known as the "infringement test", protects the inherent right of tribes to be self-governing and applies in subject areas in which federal legislation is absent.

Therefore, if Congress is silent on an issue, the question of which government has jurisdiction will be determined by focusing on the inherent sovereign authority and laws retained by the tribes and on whether state action has infringed on that authority.

What constitutes federal preemption, and how is it applied?

If Congress has passed legislation regulating a particular subject matter, the issue of which government has jurisdiction is determined by applying what is known as the **"preemption"** test. If a state enacts legislation to regulate a matter that is already heavily regulated by the federal government, the court will evaluate or "balance" the interests of the state against the federal and tribal interests and make a **"particularized inquiry into the nature of the state, federal and tribal interests at stake".**[3] Because the test is very fact specific, results can vary from state to state and issue to issue.[4]

How have the courts defined the civil adjudicatory authority of tribes?

In Indian law cases, one must first determine which court, state or tribal, has the authority to "adjudicate" or decide the particular matter. The United States Supreme Court and the Montana Supreme Court have both stated that **civil jurisdiction over the activities of non-Indians on reservations presumptively lies in tribal court unless limited by Congress.**[5] In a case involving a Montana tribe, the United States Supreme Court ruled that petitioners must first exhaust tribal court remedies before the federal courts can entertain a challenge to tribal court jurisdiction.[6] The Court provided:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full

> opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[7]

May a non-Indian avoid tribal court by taking a civil complaint directly to federal court?

No. Although the question of whether a tribe has the power to compel a non-Indian to submit to the civil jurisdiction of the tribal court is a "federal question", courts have consistently held that a non-Indian must first exhaust tribal court remedies.[8] Once tribal court remedies have been exhausted, a defendant may ask for review in federal court. Courts believe that this exhaustion policy supports Congress's commitment to tribal self-determination and encourages tribal courts to explain to parties the precise basis for accepting jurisdiction.

The United States Supreme Court has defined three exceptions to this exhaustion requirement:

(1) when the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;

(2) when the tribal action is patently violative of express jurisdictional prohibitions; or

(3) when exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

However, federal court review will involve only a review of the tribal court's determination of jurisdiction.

What is civil regulatory jurisdiction?

Governments regulate conduct through zoning, licensing, taxation, or other methods. Unless limited by Congress, a tribe has exclusive regulatory jurisdiction over its members and over land held in trust.

Does a tribe have exclusive regulatory jurisdiction over all people and land within the boundaries of a reservation?

No. The United States Supreme Court has applied the infringement-preemption tests to hold that:

(1) a tribe may regulate the actions of **non-Indians** who enter consensual relations with the tribe or its members;[9]

(2) a tribe may regulate the conduct of **non-Indians** on **fee** land within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe;[10]

(3) a state may regulate **non-Indians** and **lands held by non-Indians on reservations** unless the regulation is prohibited by federal law or the federal regulatory scheme, including tribal regulations, is so pervasive that it leaves no room for state regulation or unless the exercise of state jurisdiction, in the absence of federal law, interferes with the right of the tribe to govern itself.[11]

ENDNOTES

1. Worcester v. Georgia, 31 U.S. 515, 561 (1832).

2. Williams v. Lee, 358 U.S. 217, 220 (1959).

3. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Montana has applied its own test that appears to combine and require application of both the infringement and preemption tests. The Montana test used to determine whether the state has jurisdiction over reservation Indians requires a court to determine whether:

> (1) the assertion of subject matter jurisdiction by Montana's administrative and judicial tribunals is preempted by federal law; and
> (2) the assertion of subject matter jurisdiction by Montana's administrative and judicial tribunals would unlawfully infringe on [a tribe's] right to make its own laws and be ruled by them. See First, Jr. State ex rel. LaRoche, 247 Mont. 465, 470, 808 P.2d 467 (1991).

4. The Court can, and has, changed its mind on issues. In 1988, Montana's tax on coal produced on the Crow Reservation was invalidated because, among other things, the Court believed that a state would interfere with the tribe's taxing authority and, if taxes were imposed by both governments, would interfere with federal policies supporting tribal self-sufficiency and economic development. See Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988). In 1989, however, the Court allowed New Mexico to impose a severance tax on oil and gas although the tribe was already taxing the same resource production. In Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), the Court stated that no proof existed that double taxation rendered the resource unmarketable, nor was federal regulation so comprehensive as to preempt the state's tax. See also Burlington Northern R.R. Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), cert. denied, 112 S. Ct. 204 (1991), in which the Court ruled that sustaining a tribal tax that creates double taxation may be unfair but legal.

5. Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987); Milbank Mutual Insurance Co. v. Eagleman, 218 Mont. 58, 705 P.2d 1117, 1120 (1985).

6. National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

7. National Farmers Union at 856-857.

8. National Farmers Union.

9. Morris v. Hitchcock, 194 U.S. 384 (1904).

10. Montana v. United States, 450 U.S. 544, 565 (1981). However, see Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989), in which the Court ruled that the Yakima Nation's zoning of non-Indian owned fee land within a substantially checkerboarded area of the reservation is impermissible. Tribal zoning was upheld when there was little non-Indian ownership and when lands were important to the tribe's culture and natural resources.

11. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

CRIMINAL JURISDICTION IN INDIAN COUNTRY

Every government exercises a power, called criminal jurisdiction, to prohibit certain behavior within its borders by enacting criminal laws and by punishing those persons who violate them. Criminal jurisdiction in Indian country is complex. There is not an Indian reservation in the United States in which the federal, state, and tribal governments can simultaneously exercise their full criminal jurisdiction.

How does one determine whether the federal, state, or tribal government has jurisdiction to prosecute and punish crimes committed in Indian country in Montana?

The answer to this question depends on a number of factors, including:

(1) the location of the crime;

(2) the type of law violated; and

(3) whether the victim or perpetrator was an Indian or non-Indian.

What federal statutes determine criminal jurisdiction in Indian country?

(1) the General Crimes Act;

(2) the Assimilative Crimes Act;

(3) the Major Crimes Act; and

(4) Public Law 83-280.

General Crimes Act (often called the Federal Enclaves Act):

Under federal law, there are criminal offenses, such as an assault on a federal officer, that are applied nationally without regard to the location of the offense. The federal government has exclusive jurisdiction over these crimes, whether they occur in Indian country or elsewhere. In addition to these crimes of nationwide application, federal criminal law contains references to crimes that apply to those areas under the sole and exclusive jurisdiction of the United States government. These areas are known as "**federal enclaves**" and initially included military installations and national parks.

In 1817, Congress enacted a jurisdictional statute, the **General Crimes Act,**[1] which was also known as the Federal Enclaves Act, **providing that with certain exceptions, federal criminal laws apply in Indian country to the same extent that they apply in other federal enclaves.** The Act was originally passed to permit punishment of all crimes committed by non-Indians in Indian territory, as well as some crimes committed by Indians against non-Indians. Such crimes, at the time, were assumed to be beyond the reach of state or tribal law. Today, the Act's primary function is to provide for prosecution of crimes by non-Indians against Indians and of nonmajor crimes by Indians against non-Indians.

In 1825, Congress enacted a second jurisdictional statute known as the **Assimilative Crimes Act**[2] that **provided that state criminal laws not otherwise included in the federal criminal code were incorporated into federal law by reference and made applicable to federal enclaves.** A violator of the Assimilative Crimes Act is charged with a federal offense and is tried in federal court, but the crime is defined and the sentence is prescribed by state law.

Does the Assimilative Crimes Act apply to Indian country?

Yes. In 1946, the U.S. Supreme Court ruled that the Assimilative Crimes Act applies in Indian country.[3] Under this ruling, the criminal laws applicable to Indian country and subject to federal jurisdiction include both federal enclaves crimes and state crimes not otherwise included in the federal criminal code. The Assimilative Crimes Act is relevant because it is one of the general laws of the United States that is extended to Indian country by the General Crimes Act.

Are there any exceptions to the General Crimes and Assimilative Crimes Acts?

Yes. The scope of the General Crimes Act and the Assimilative Crimes Act is limited by two statutory exceptions and one judicially created exception. The exemptions include:

(1) offenses committed by one Indian against the person or property of another Indian;

(2) offenses over which criminal jurisdiction has been conferred on a particular tribe by treaty; and

(3) according to Supreme Court cases,[4] crimes committed in Indian country by a non-Indian against another non-Indian.

The General Crimes Act extends only to crimes in which an Indian is involved as either a defendant or a victim.

Major Crimes Act:

In 1885, Congress's policy of not asserting federal criminal jurisdiction over Indian versus Indian crimes was reversed by passage of the Major Crimes Act.[5] The Act came in response to an 1883 Supreme Court ruling[6] in which the Court had ordered federal officials to release an Indian who had murdered another Indian because the government did not have jurisdiction over reservation crimes committed by one Indian against another.

Congress reacted to this decision by passing the Major Crimes Act, which gave the federal government jurisdiction over seven major crimes when committed by an Indian against the person or property of any other person in Indian country. The Major Crimes Act has been amended several times and now covers more than a dozen crimes. **Unlike the General Crimes Act, the Major Crimes Act applies only to Indians.** Today, the Major Crimes Act is the primary federal jurisdictional statute for major offenses committed by Indians in Indian country.

Public Law 83-280:

Public Law 83-280[7] was passed by Congress in 1953. A product of the "termination" era, P.L. 280 gave six states mandatory and substantial criminal and civil jurisdiction over Indian country within their borders. In these states, P.L 280 gave the states the same power to enforce their regular criminal laws inside Indian country that they had always exercised outside it. State law supplanted federal law. The General Crimes Act and the Major Crimes Act no longer applied. Other

states, including Montana, were given the option to acquire similar jurisdiction in Indian country, and tribal approval was not required until 1968.

From the outset, P.L. 280 was criticized by tribes and states. States resented being directed to provide law enforcement services with no federal assistance, and tribes resented state jurisdiction being forced upon them without their consent. This joint dissent led to amendments to P.L. 280, which now requires tribal approval and provides a process for states to "retrocede" or transfer back jurisdiction to the federal government. In Montana, only one reservation, the Flathead, was affected by P.L. 280. (See chapter on Public Law 83-280 for discussion of the law in Montana.)

Are there any limitations to a state's criminal jurisdiction under P.L. 280?

Yes. Public Law 280 contains express exceptions[8] to criminal jurisdiction to preserve the trust status of Indian property and to protect Indian treaty rights. Reservation Indians are not required to comply with state law on zoning, hunting, or fishing or to pay property taxes on trust land, and the state may not impose criminal penalties for failure to do so.[9]

Does P.L. 280 grant a state jurisdiction to impose all state law defining offenses and imposing penalties in Indian country?

No. In a 1987 decision,[10] the United State Supreme Court ruled that a state could not enforce its gambling laws on Indian land because the laws were regulatory in nature, not criminal. To determine whether a law was criminal/prohibitory or civil/regulatory, the Court stated:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the state's public policy.[11]

Does a tribe have criminal jurisdiction over a non-Indian committing a crime in Indian country?

No. Until 1978, it was believed that a tribe retained sovereign powers unless those powers were specifically removed by Congress or relinquished by treaty. In a 1978 decision,[12] the United State Supreme Court ruled that powers not implicitly removed as a result of an Indian tribe being incorporated within the United States do not exist unless delegated to tribes by Congress. Absent congressional authority, the Court ruled that tribes may not exercise criminal jurisdiction over crimes committed against Indians on Indian land by non-Indians. Jurisdiction over these crimes on six reservations in Montana resides with the federal government or, on the Flathead Reservation because of P.L. 280, with the state.

Location of Crime	Jurisdiction: Federal	State	Tribal
1. Outside Indian Country (Indian defendant)			
A. Federal law involved	Yes	No	No
B. State law involved	No	Yes	No
C. Tribal law involved	No	No	#Maybe
2. Inside Indian Country (Indian defendant) P.L. 280 state	No	Yes	No
3. Inside Indian Country No P.L. 280 state			
A. Crimes by I vs. I			
1. Major Crimes Act	Yes	No	No*
2. Other crimes	No	No	Yes
B. Crimes by I vs. NI			
1. Major Crimes Act	Yes	No	No*
2. General Crimes Act	Yes	No	Yes**
3. Assimilative Crimes Act	Yes	No	Yes
C. Crimes by NI vs. I			
1. General Crimes Act	Yes	No	No
2. Assimilative Crimes Act	Yes	No	No
D. Crimes by NI vs. NI	No	Yes	No
E. Victimless/Consensual Crimes			
1. Crimes by I	No	No	Yes
2. Crimes by NI		Yes***	
a. General Crimes Act	Yes	Yes*	No
b. Assimilative Crimes Act	Yes	Yes*	No

If tribal member involved.

* Law is unsettled in this area.

** If prior punishment by tribal court or if tribal jurisdiction is established by treaty or statute, federal jurisdiction under General Crimes Act is withheld.

*** Some statutes permit concurrent jurisdiction.

Source: American Indians Today, Utter, 1993, p. 157

ENDNOTES

1. 18 U.S. § 1152 provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

2. 18 U.S.C. § 13 provides: "(a) Whoever within [the special maritime and territorial jurisdiction of the United States] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force and at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment".

3. Williams v. United States, 327 U.S. 711 (1946).

4. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).

5. 18 U.S.C. § 1153 provides: "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, **murder, manslaughter, kidnapping, maiming, [felonious sexual molestation of a minor], a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title** within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States".

6. Ex Parte Crow Dog, 109 U.S. 556 (1883). In Crow Dog, the Supreme Court ruled that federal courts lacked jurisdiction to prosecute an Indian who had already been punished by the tribe for killing another Indian. The punishment given by the tribe, restitution to the victim's family, was viewed by many non-Indians as an insufficient punishment for the crime of murder. Congress responded by granting the federal courts jurisdiction for violent crimes committed on Indian reservations.

7. 18 U.S.C. § 1162; 28 U.S.C. § 1360. The states required to assume criminal jurisdiction over Indian reservations within their boundaries were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. Public Law 280 also authorized other states to assume criminal jurisdiction over Indian lands at their discretion. Originally, P.L. 280 did not require tribal consent for a state to assume jurisdiction. In 1968, the law was amended to require tribal consent to future state decisions to assume jurisdiction.

8. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(b) provides: "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner

inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto ...".

9. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977).

10. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). This case ultimately led to Congress's enactment of the Indian Gaming Regulatory Act (IGRA) of 1988, 25 U.S.C. §§ 2701 through 2721, which provides a federal regulatory scheme to govern various forms of gaming on Indian reservations.

11. Cabazon at 209.

12. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

How do Indian tribes govern themselves?

Most tribal governments are organized in much the same way as state and local governments. Legislative authority is vested in an elected body often referred to as a tribal council, although it can be known by other names, such as business committee or executive board. The council members can be elected either by district or at large. In some instances, the members are nominated by district but are elected at large. The council governs the internal affairs of the tribe with one important exception. Many tribal resolutions and ordinances may be subject to review by the Secretary of the Interior. In some instances, the Secretary may have veto power over tribal ordinances.

Executive authority is exercised by a presiding officer often called a tribal chairman. The chairman can be elected either at large or by the members of the council. The duties of the chairman are often not spelled out in the tribal constitution or bylaws. Therefore, the role of the chairman often depends on the governing structure of the tribe.

Tribal governments also have a court system. The system can vary from a highly structured system with tribal prosecutors and tribal defenders and an appellate system to a simpler judicial system that operates on a part-time basis. Tribal judges can be popularly elected or appointed by the tribal council. Tribal judges generally are not attorneys, but some tribes require preparation for office by administering judicial qualification examinations; tribal court judges all receive judicial training while in office. Tribal governments often do not have the "separation of powers" that calls for an independent judiciary. How independent a tribal court is from a tribal council depends on the method of selecting judges, council tradition, and the character of the individual judge. In many ways, this is similar to the federal judiciary that also relies upon appointed rather than elected judges.

Are modern tribal governments based on traditional governance structures of the Indian tribes?

No. Most modern tribal governmental structures have their origin in the Indian Reorganization Act (IRA) of 1934 (25 U.S.C. § 476). Prior to the arrival of the Europeans, tribal governments varied from the highly complex, as represented by the Iroquois League, to the less formal, as represented by the tribes of the Great Basin deserts. However, within this range of complexity were certain common characteristics: the integration of the political with the religious; the importance of the tribe over the individual; and consensus decisionmaking.

With displacement and the confinement of tribes on reservations and the establishment of the Indian agent system by the federal government, traditional tribal governing structures were forcibly suppressed. In 1934, the federal government passed the IRA in an attempt to re-establish tribal self-government, but basing it on a western European model. The BIA drew up a standard constitution that established a representative form of government that tribes were free to adopt and that almost three-fourths of the tribes did adopt, with limited expressions of historic tribal governing principles. Tribes that adopted IRA constitutions have revised them over the years to reflect individual tribal concerns and to exercise greater tribal autonomy. However, the constitutions still retain many of the original provisions.

One result of the IRA was the creation of a single tribal government for more than one Indian tribe. This occurred because in some instances, the federal government had placed more than one tribe on a single reservation. In Montana, an example is the placement of the Assiniboine and the Sioux together on the Fort Peck Reservation. The IRA did not allow for separate governments for each tribe. In order to retain some cultural identity, some tribal governments have made constitutional provisions for elected representatives of each tribe to serve on the tribal council. The Fort Belknap Tribes go one step further by requiring the candidates for chairman and vice chairman to run as a team, with one being a Gros Ventre and the other an Assiniboine.

Are there any tribes that did not reorganize under the IRA?

Yes. Approximately 30% of the tribes in the United States chose not to come under the IRA. The most notable exceptions are the Navajos and the Pueblos. In Montana, the Crow Tribe rejected the IRA in favor of a general council form of government, in which each enrolled tribal member has a vote if the member attends the general council meeting. The general council elects the tribal officers who are responsible for the day-to-day operations of the tribal government. The Fort Peck Tribes also rejected the IRA and operated with a general council form of government until 1960 when a representative tribal council was established.

What types of activities do tribal governments engage in today?

Tribal governments engage in a number of activities that relate to the governance of reservation affairs. These activities include: defining conditions of membership; regulating domestic relations of members; prescribing rules of inheritance for reservation property not in trust status; levying taxes; regulating property under tribal jurisdiction; controlling conduct of members by tribal ordinance; administering justice; conducting elections; developing tribal health and education programs; managing tribal economic enterprises; managing natural resources; enacting environmental protection; and maintaining intergovernmental relations at the federal, state, and local levels.

ECONOMIC DEVELOPMENT

The 1990 census data shows that American Indians are the most poverty-stricken group in the United States. Three of the 10 poorest counties in the country are within Indian reservations. Of the five counties with the highest unemployment rates in Montana, three are part of Indian country. Annual unemployment rates range from 40% on the Flathead Reservation to nearly 70% on the Rocky Boy's Reservation.

Each of the seven reservations has different material bases for future wealth. The Crow Reservation has millions of tons of strippable, low-sulphur coal, as well as abundant acreage of good rangeland. The neighboring Northern Cheyenne Reservation also has large coal reserves in addition to some valuable timber. The Blackfeet Reservation is mostly rangeland, but there are oil and gas deposits along the Rocky Mountain Front, as well as valuable water resources and good potential for wind-generated energy. While the Fort Peck Reservation consists of mostly agricultural land, some of which is irrigated, the reservation also has good oil and gas deposits. Like Fort Peck, Fort Belknap also has irrigated agricultural land, and though there is a huge gold mine just outside the reservation boundary and quantities of hard-rock minerals in the mountains, the benefits to people on the reservation are limited. The Rocky Boy's Reservation is the smallest in the state; its resource base is meager. The Flathead Reservation enjoys the greatest diversity of resources. The potential for tourism and gaming around Flathead Lake is almost incalculable. The water resources of Indian nations in Montana are considerable and may play key roles in the future development of reservation-based and regional economies.

How do Indians earn a living in Montana?

Montana Indians are engaged in much the same variety of occupations as are non-Indians in other mostly rural communities around the state. Government is the chief employer on most Indian reservations. Federal and tribal agencies hire Indians to staff a diversity of programs, ranging from finance to health and welfare to timber and waste management. Education also provides jobs, including administrators, teachers, and support personnel. The seven tribal colleges are important both as

training and learning institutions for both Indians and non-Indians and as a locus of employment for highly educated Indians.

In the private sector, perhaps the most visible occupation in Indian country is farming and ranching and related activities, such as equipment sales, feed and fuel suppliers, and shops for the maintenance and repair of vehicles. This is a deceptive picture, however. According to the Montana Bureau of Business and Economic Research (which relied on 1990 data), about 40% of the Indian businesses in the state are in the service sector. The next largest category is retail trade (21%), followed by construction (11%), manufacturing (7%), transportation (6%), and agriculture (5%).[1]

Arts and crafts is a growth industry in Indian country as a subset of tourism and in its own right. There is some controversy over what constitutes authentic Indian art. In response, Congress passed the Indian Arts and Crafts Act of 1990.[2] Title 30, chapter 14, part 6, of the Montana Code Annotated concerns the sale of imitation Indian art. The statutes require a registered trademark or a label authenticating Indian origin.

Indians also receive income from various types of tribal resources, such as per capita disbursements based on tribal resource royalties, tribal government investments, various trust accounts, and treaty settlements.

There is some manufacturing. The Montana Indian Manufacturing Network (MIMN) is funded by the Northwest Area Foundation, assisted by the Montana United Indian Association and Eastern Montana College (now MSU-Billings) with organizational development. One of the attractive aspects of the MIMN is that companies doing business on an Indian reservation are relieved of a long list of taxes, depending on the degree of tribal participation. The MIMN was formed to use existing manufacturing capabilities on a cooperative basis.

Members of the MIMN are the Blackfeet Indian Writing Company in Browning; the Northern Cheyenne Industries in Lame Deer; ISC Distributors in Bozeman; Fort Belknap Industries, Inc.; Great Divide Manufacturing Company in Wolf Point; A&S Tribal Industries (ASTI) in Poplar; West Electronics, Inc., in Poplar; Rocky Boy's Manufacturing, Inc., in Box Elder; and S&K Electronics in Pablo.

In August of 1994, the Fort Peck Tribes declared the reservation an economic disaster zone after sharp cutbacks at ASTI reduced the full-time workforce from a high of 500 employees during Desert Storm to 5 employees. This misfortune points to the vulnerability of manufacturing enterprises that are wholly dependent on federal contracts. The decrease in defense spending forced ASTI to lay off over 75% of its workers in 1993. The Rocky Boy's enterprise is reportedly on the verge of shutting down completely. S&K Electronics in Pablo has one private sector arrangement to produce medical bags and is certified as a minority contractor under a United States Small Business Administration program. The members of MIMN recognize that all are in need of commercial marketing expertise and private capital to reduce their reliance on federal contracts.

Why are unemployment rates so high and incomes so low on the Indian reservations in Montana?

Conditions on Indian reservations are similar to those in developing countries. The lack of certain key resources, such as financial capital, leads to shortages of other resources, such as adequate water and sewer systems. Disincentives for capital investment include out-migration of educated workers, the underdeveloped infrastructure, a disadvantaged labor force, the inability to use land assets as collateral, and vulnerability to double taxation.

Poverty begets poverty. Wage levels are low; manufacturing jobs pay only $5 to $7 an hour. Tribal members suffer from relatively low levels of education and training. There is an absence of finance capital (only one Indian bank) in Montana's Indian country. Because most land is held in trust, a lack of collateral makes it difficult for tribes and individual tribal members to obtain business loans. The downsizing of

federal defense contracts has reduced the demand for Indian manufactured products. Substandard water and sanitation, transportation and communication, and housing make it difficult to attract and retain business investors.

What are some of the major barriers to economic development on Indian reservations?

There are a number of barriers that prevent tribes and tribal members from developing viable economic activities on Indian reservations, including the following:

- requirement of federal approval for land sales and encumbrances, such as mortgages;
- jurisdictional complexity;
- complicated, checkerboard patterns of land ownership;
- underdeveloped infrastructure;
- perception among investors that Indian country is politically volatile;
- vulnerability of firms to double taxation (state and tribal) of operations on Indian reservations;
- reluctance of some outside business interests to invest in Indian country when conventional remedies for breach of contract may not always be obtainable.

Aren't there a host of federal aid programs designed to boost economic development on Indian reservations?

There are some programs, but they are limited in scope and magnitude. The BIA administers a number of financial assistance programs for economic development projects. The Indian Revolving Loan Fund will lend up to $350,000 per project to economic enterprises that will contribute to an Indian reservation's economy. The Indian Loan Guarantee Fund provides loan guaranties for tribes and individual Indians for any purpose consistent with Indian economic development, including loans for educational purposes. The Indian Business Development Grant program provides seed capital for profit-making businesses on or near reservations. In addition to financial assistance, the BIA operates business promotion and technical assistance programs that publicize investment potential on reservations and assist Indian businesses to get established or to expand facilities.

The Economic Development Administration (EDA) in the U.S. Department of Commerce provides grants or loans to fund public works projects, such as industrial parks, recreational facilities, and water and sewer systems. The EDA also provides planning grants to Indian organizations to develop long-range economic development plans.

The U.S. Small Business Administration administers a special certification program to assist small, minority-owned companies to grow into viable, competitive businesses. The 8(a) program, as it is known, also helps federal agencies to meet mandated minority business development goals. Program benefits include the provision of skills training, technical assistance, and limited financial aid. Indian entrepreneurs and tribally owned enterprises are both eligible to compete for contracts under this program. (Sovereign immunity must be waived.)

The U.S. Department of Transportation administers a Disadvantaged Business Enterprise (DBE) program for minority businesses that are qualified to participate in federal highway construction. The DBE program provides supportive services, such as help with marketing, business plans, financial accounting, and advertising. At the end of 1993, there were 45 Indian-owned firms certified as DBEs. (The Montana Department of Transportation maintains a directory of Indian DBEs in the state.)

Funding for most Indian aid programs has gone down in recent years. A March 1994 Congressional Research Service report found that, after taking inflation into account, funding for every major program benefiting Indian country (BIA; Office of Indian Education; and HUD's Indian housing effort) has fallen off over the past 20 years. Only the Indian Health Service has enjoyed increased funding.[3] In addition, some programs intended to benefit Indian nations do not result in appreciable gains, either because so much of the capital outlay is absorbed by administrative overhead costs or because tribal governments lack the technical expertise (or patience) to comply with heavy paperwork and recordkeeping requirements.

President Clinton's 5-year, $500 billion deficit reduction plan includes two provisions for Indian reservations: an employment tax credit and a property depreciation tax deduction. Both are aimed at attracting private industry to reservation areas. The employment tax measure provides a single-rate, 20% wage credit for the first $20,000 of qualified wages and health insurance costs paid to an Indian employee. The property depreciation feature is not likely to have much effect because Indian government enterprises are not liable for federal taxes anyway, except for personal income taxes.

If economic conditions are so bad on the reservations, why don't the people just leave and move to where the jobs are?

It is dangerous to generalize, and each individual has different reasons for deciding to stay or move on. American Indians typically have strong ties to their homeland and to their extended families. Maintaining them across great distances is difficult and expensive. This is not unlike other people in Montana whose families have inhabited the same area for generations. Many Indians feel strong attachments to the land as well as to their home communities. Also, the prospects for succeeding off the reservation are not great. Off the reservation, many Indians end up stranded without adequate income (if they have any employment at all) and no networks or other bases of support to help them struggle through rough times. Although jobs are more plentiful in the metropolitan areas of the country, there is no guaranty that relocation will reap any reward, let alone benefits that exceed the incalculable worth of being at home with friends, relatives, and legal protections in the trust relationship with the federal government.

Urban Indians face additional barriers and challenges, and they may not qualify for the benefits afforded federally recognized tribes. A mere 1% of the Indian Health Service budget is allocated to medical clinics and related facilities in urban areas. Indian families in urban areas are sometimes discriminated against in their search for affordable housing and jobs.

Is there evidence of economic success and positive potential among the Indian nations in Montana?

Yes, quite a bit. Growth in the gaming industry is the most visible example of economic success in the making, even though it is fraught with controversy and has not progressed as far in Montana as in other states with significant Indian populations.

The Inter-Tribal Bison Cooperative (ITBC) is a consortium of 32 tribes, including the Crow, Blackfeet, Confederated Salish and Kootenai, Gros Ventre and Assiniboine at Fort Belknap, and the Northern Cheyenne. The ITBC is a nonprofit cooperative funded through grants and donations. The ITBC's mission is to restore buffalo to the Indians as a means of cultural enhancement, ecological restoration, and economic development that is compatible with the cultural and spiritual beliefs and practices of the member tribes. The number of buffalo among member tribes increased from 3,000 in 1990 to over 5,000 today. The U.S. Department of Agriculture has recognized tribal buffalo programs as examples of sustainable agriculture.

The Montana Arts Council received a $25,000 Rural Development Project matching grant from the national Endowment for the Arts to use Blackfeet cultural resources as a tool for economic development. The grant will support Blackfeet crafts and cultural programming at Glacier National Park to replace nonlocal, non-Indian programs. The project is using arts and culture to renew community spirit, provide jobs, and enable more people to learn about traditional ways.

The Montana Community Foundation selected Browning to be one of three "Beacon Communities" in Montana to participate in a rural revitalization program funded by the Ford Foundation. The town will receive $350,000 over 3 years to develop a recycling center that will in turn serve as a hub for spinoff cottage industries and job training programs.

High school graduates on the Fort Belknap, Blackfeet, and Flathead Reservations have new opportunities to work at day-care centers, Head Start, alcohol rehabilitation programs, and parks maintenance jobs under Montana AmeriCorps, a federal initiative launched in September of 1994.

The main goal of the Council of Energy Resource Tribes is to improve the flow of primarily private capital to Indian nations so that they retain control of their lands and resources. The Council's Tribal Development Finance program helped capitalize the Blackfeet National Bank, the only tribally owned bank in Montana.

The Fort Peck, Blackfeet, and Crow Reservations are slated to receive federal support to develop plans for renewable and fossil fuel resources. Fort Peck was awarded a grant to study wind power potential on the reservation, the Crow a grant for a coal-fired electricity plant, and the Blackfeet a grant for an energy-management system.

What are some of the steps that tribal leaders can recommend their people take to improve the business climate in Indian country?

There are a number of different initiatives that tribal leaders can take to improve the business climate, including the following:

- Separate politics from business management decisions.
- Diversify the manufacturing base to better position the reservations in light of domestic and international market trends.
- Focus on basic education and technical training to increase the flexibility and productivity of the Indian labor force.
- Expand the land and resource base through purchases from as well as exchanges with the state and federal governments.
- With federal help (not just money), devise investment procedures consistent with the trust status.
- Communicate with non-Indian neighbors.
- Approach natural resource development and other economic activities in a holistic manner, taking into account the totality of social and cultural needs of the tribal nations.

ENDNOTES

1. Shannon H. Jahrig, "Indian Businesswoman Succeeds Despite Roadblocks," Montana Business Quarterly (Winter 1993), p. 10.

2. 25 U.S.C. §§ 305 through 305e.

3. Carol Bradley, "GOP Expected to Back More Self-Rule for Reservations," Great Falls Tribune, November 23, 1994.

EDUCATION

Who is responsible for the education of Indian students?

As United States citizens and citizens of the state in which they reside, Indian students are entitled to participate in public education programs. However, prior to their being granted citizenship, Indian students attended schools operated by the BIA. Over the years, responsibility for Indian education has shifted from the BIA to state and tribal governments. The few BIA boarding and day schools that remain provide education for Indian students with special education or social needs. The vast majority of Indian students attend state public schools.

If Indian students attend public schools but Indian trust land is exempt from property taxation, how are public school districts that encompass Indian reservations financed?

The federal government has created three programs that reimburse public school districts for the cost of educating Indian children. The Johnson-O'Malley Act (JOM)[1] provides funding for special programs that benefit Indian students, such as special language classes, home-school coordinators, teacher aides, and summer programs; use of JOM funds for the general operating expenses of a school district is severely restricted. Although JOM itself does not distinguish between on- and off-reservation Indians, the regulations give priority to programs serving Indians living on or near reservations.

The Educational Agencies Financial Aid Act,[2] often referred to as Public Law 81-874, provides funding to school districts that have large blocks of tax-exempt federal land within their boundaries. This includes military installations as well as Indian reservations. Public Law 81-874 funds are used for general operating expenses, such as textbooks, equipment, and salaries, but may not be used for construction. School construction funds for school districts in which federal installations are located are available through the School Facilities Construction Act.[3]

Are there other federal programs that benefit Indian students?

Yes. The Indian Education Act (IEA) of 1988[4] assists school districts in developing programs designed to meet the special educational and culturally related academic needs of Indian students. Grants can be used for bilingual and bicultural programs, for special health and nutrition services, for remedial instruction, for guidance and counseling services, for early childhood programs, and for special education programs benefiting disabled and gifted and talented Indian children. The Act also makes funds available for fellowships in graduate and professional programs as well as for adult education programs. Most Indian students are also eligible to participate in Title I programs created by the Elementary and Secondary Education Act (ESEA) of 1965.[5] Title I provides compensatory education programs for economically and educationally disadvantaged children, Indian and non-Indian alike.

What is the role of tribes in the area of Indian education?

On all of Montana's seven Indian reservations, education is of major importance. Each tribal government has an education department whose mission is to provide and promote quality educational opportunities for all tribal members from early childhood through adulthood. Some of the educational services provided by Montana tribes, either through federal contracts or grants or through tribal resources, include Head Start, guidance and counseling services, native language and culture programs, monetary allowances for college students, career opportunity fairs, and tribally operated colleges. The federal policy of Indian self-determination has also led to the encouragement of schools operated by tribes or by Indian organizations, rather than by the state. To foster this policy, the federal government provides financial assistance to Indians administering their own schools in much the same manner as it assists public school districts. This includes JOM, Title I of ESEA, IEA, and school construction. The federal government also assists tribal colleges through the Tribally Controlled Community College Assistance Act of 1978[6] by providing grants for the operation and improvement of these colleges.

Are there any tribally controlled schools in Montana?

Yes. There are two tribally operated, nonpublic schools accredited by the Board of Public Education: Two Eagle River on the Flathead Reservation and the Northern Cheyenne Tribal Schools located at Busby on the Northern Cheyenne Reservation.

Are there any tribally controlled colleges?

Across the nation, there is a total of 29 tribally controlled colleges located in Indian country. Of this group, **Montana is unique because it is the only state with a tribally controlled college located on each reservation.**[7] These colleges are similar to community colleges in that they offer 2-year associate degrees in a number of areas and serve both Indian and non-Indian students. However, Salish Kootenai College has recently started offering baccalaureate degrees in a limited number of areas.

What does the State of Montana do to foster Indian education?

Article X, section 1, of the Montana Constitution states:

> (2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

The state has implemented a number of policies designed to address this commitment. School districts with a significant Indian enrollment may require certified personnel to take instruction in American Indian studies. In 1989, the Commissioner of Higher Education, with the assistance of a Ford Foundation grant, began the Tracks Project to address the high dropout rate of Indian students from public schools. One outcome of the Tracks Project was the creation of the Office of Minority Achievement in the Office of the Commissioner of Higher Education. In addition, Governor Racicot appointed an Indian to the Board of Regents for the first time in that Board's history. The Montana University System offers a fee waiver to Indian students to assist them in attending a unit of the University System. The fee waiver does not cover all of the costs associated with higher education.

ENDNOTES

1. 25 U.S.C. §§ 452 through 457.
2. 20 U.S.C. §§ 236 through 245.
3. 20 U.S.C. §§ 631 through 647.
4. 25 U.S.C. §§ 2601 through 2651.
5. 20 U.S.C. § 2701, et seq.
6. 25 U.S.C. §§ 1801 through 1852.
7. The seven tribal colleges in Montana are:

   Salish Kootenai College (Flathead);

   Stone Child College (Rocky Boy's);

   Little Big Horn College (Crow);

   Dull Knife Memorial College (Northern Cheyenne);

   Blackfeet Community College (Blackfeet);

   Fort Belknap Community College (Fort Belknap); and

   Fort Peck Community College (Fort Peck).

INDIAN GAMING

What is the Indian Gaming Regulatory Act?

The Indian Gaming Regulatory Act (IGRA) is a federal law enacted in 1988 for the regulation of gambling in Indian country.[1]

Why was the IGRA passed?

Beginning in the late 1970s, some Indian tribes instituted high-stakes bingo games on their reservations as a means of generating revenue for the operation of tribal programs. As the success of these tribes' endeavors spread, more tribes turned to gambling as a solution for the economic hardships suffered by many Indians. As the gambling spread, questions arose as to what types of gambling were legal and who was responsible for regulating Indian gambling. These questions and concerns led to a series of court cases that limited state regulation of Indian gambling.[2] In response to these questions and concerns, the federal government enacted the IGRA to codify these court decisions and to provide a legislative basis for the operation and regulation of Indian gaming.

The purposes of the IGRA are multiple:

(1) to establish a National Indian Gaming Commission to meet congressional concerns and to protect gaming as a means of generating tribal revenue;

(2) to promote economic development, self-sufficiency, and strong tribal governments;

(3) to shield tribes from organized crime; and

(4) to ensure fairness to operators and players.

How does the IGRA work?

The IGRA divides gambling into three classifications. Class I gaming includes social and traditional games played in conjunction with tribal ceremonies, powwows, or

celebrations. Class I games are regulated exclusively by Indian tribes and are not subject to the IGRA.

Class II games include bingo, lotto, pull tabs, punch boards, tip jars, and certain card games, if the games are allowed by the state in which the Indian lands are located. The tribes and the National Indian Gaming Commission share jurisdiction over Class II games. The tribe must adopt an ordinance authorizing the games, and the Commission must approve the ordinance.

Class III games include all types of games that are not Class I or Class II and that are permitted by the state. The usual casino games as well as slot machines, video poker, and horse and dog racing are considered Class III games. Class III games are regulated by a compact negotiated between the state and a tribe. It is this compacting process that has created the current furor over Indian gaming.

How do these state-tribal compacts work?

Before a tribe may operate Class III games, the tribe must request that the state enter into negotiations for a gaming compact. The compact can cover such provisions as the application of criminal and civil laws of the state and the tribe, assessment by the state for costs related to regulation, taxation by tribes to defray regulation costs, remedies for breach of contract, and any other subjects related to gaming. Once the compact is concluded, it is submitted to the Secretary of the Interior for approval.

What happens if the state fails to negotiate?

If the state fails to negotiate, the tribe may initiate a cause of action in U.S. District Court, alleging failure of the state to enter into negotiations or to conduct the negotiations in good faith. The burden of proof lies with the state to prove that it did negotiate in good faith. If the court finds for the tribe, the state and the tribe have 60 days in which to negotiate a compact. If after 60 days a compact has not been concluded, each side must present a proposed compact to a court-appointed mediator. The mediator must select the compact that most closely complies with

the IGRA and any other applicable federal law, as well as the court findings. If the state refuses to accept the mediator's compact, the Secretary of the Interior is notified, and the Secretary will prescribe, in consultation with the tribes, the procedures under which Class III gaming may be conducted. The procedures must be consistent with the mediator's compact, the IGRA, and state laws.

What is the status of state-tribal compacts in Montana?

The Fort Peck Tribes concluded the first gaming compact with the state in 1992. Since that time, the Crow Tribe and the Northern Cheyenne Tribe have successfully concluded compacts, although the state and the Crows are currently in disagreement over alleged violations of the compact by the Crows. The Chippewa Cree Tribe at Rocky Boy's has negotiated an interim compact that is scheduled to be renegotiated in 1995.

Three tribes are currently involved in litigation with the state over the failure to negotiate compacts: the Blackfeet, the Confederated Salish and Kootenai, and the Fort Belknap Tribes. The issue in all three cases is whether the state failed to negotiate in good faith for a compact under the IGRA. All three cases are currently pending in federal District Court, two in Great Falls and one in Missoula.

In the meantime, in the absence of a gambling compact, all Class III gambling, Indian and non-Indian, is prohibited on the three reservations. This even includes the state lottery.

What are the areas of contention between the state and the three tribes currently involved in litigation?

Some of the issues that have been raised during the negotiations include:

Types of games: Should the negotiations include all types of Class III gambling, including casino games, or only those Class III games specifically authorized in the state?

Number of machines per location: Should tribally operated enterprises be allowed more than the state limit of 20 machines per establishment?

Wager and payout limits: Should statutory wager and payout limits be raised or eliminated for tribal gambling establishments?

Jurisdiction: Who has civil or criminal jurisdiction over tribal members and non-tribal members on the reservation?

ENDNOTES

1. 25 U.S.C. §§ 2701 through 2721.

2. Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

Seminole Tribe v. Butterworth, 658 F.2d 310, 312 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983).

Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900, 906 (9th Cir. 1986), aff'd, 480 U.S. 202 (1987).

Who is the primary provider of health care for American Indians?

The primary provider of health care for American Indians is the Indian Health Service (IHS), located within the U.S. Public Health Service, which is part of the Department of Health and Human Services. The IHS is composed of 12 geographic area offices, covering 34 states. These areas are subdivided into 136 geographic Health Service Delivery Areas (delivery areas). Except for Alaska, the delivery areas are generally centered around an Indian reservation, including the area surrounding the reservation. Medical care is provided through small hospitals, health centers, and clinics within the delivery areas.

The IHS provides medical care either through direct services at IHS facilities or through contract services. The IHS prefers that eligible Indians use available IHS facilities first for their health care needs. If additional health care is required, the IHS may contract with a local health care facility or private practitioner to provide the necessary services.

The IHS pays for about 70% of the health care costs incurred by an eligible Indian. The remaining 30% comes from other sources, including private insurance and entitlement programs. In the case of contract health care costs, the IHS is the payor of last resort after applicable federal, state, local, or private health payment programs have paid.

Who is eligible to receive services from the IHS?

An individual who is a bona fide member of a federally recognized tribe and who resides in a delivery area is eligible to receive health care services from the IHS, either directly from an IHS facility or from an IHS-contract facility. An enrolled tribal member who does not reside within a delivery area is ineligible for contract care. This means that an off-reservation tribal member must travel to an IHS facility on a reservation in order to receive medical care.

Under certain circumstances, some non-Indians may receive care at an IHS facility. For example, a non-Indian woman who is pregnant with an eligible Indian's child is eligible, but only during the pregnancy and for 6 weeks following the birth. In remote areas where the only available medical care is at an IHS facility, an ineligible non-Indian may receive medical treatment on a fee-for-service basis, if the tribe approves. However, service to non-Indians, in this instance, may not interfere with the delivery of services to eligible Indians.

Are Indians eligible for other government health care programs, such as Medicaid, Medicare, or Veterans Benefits Administration health benefits?

As citizens of the United States, American Indians are entitled to the same health care programs available to non-Indian citizens, regardless of an Indian's IHS eligibility.

What health care services are provided by tribes?

Although tribal governments are extremely interested in operating part or all of the health care programs serving their tribes, their efforts have been hampered by a lack of trained Indian health professionals, meager tribal financial resources, and limited contractual authority. In 1975, the Indian Self-Determination Act authorized the IHS to provide grants to create tribal health programs and then to contract with the programs for the delivery of health services to tribes.[1]

A major support program initiated by the IHS in 1968 is Community Health Representatives (CHRs). CHRs are Indian paraprofessional health care providers who make home visits, monitor medication, follow up on hospital stays, and educate tribal members on good health practices and disease prevention, incorporating traditional Indian concepts whenever appropriate. CHRs are selected, employed, and supervised by their tribes.

CHR programs are tribally administered. Other types of programs that tribes operate through IHS contracts include chemical dependency and substance abuse, sanitation and environmental health, mental health, family planning, and nutrition.

In addition to contracted services, some tribes operate their own tribally funded programs, such as renal dialysis.

What IHS services are available in Montana?

The IHS area office in Billings is responsible for administering IHS programs in Montana and Wyoming.

The three IHS hospitals in Montana are on the Blackfeet, Crow, and Fort Belknap Reservations. The hospital at Crow Agency also serves the Northern Cheyenne Reservation. In addition, there are satellite clinics on both the Crow and Fort Belknap Reservations. On those reservations without a hospital, the IHS has contracted with local hospitals to provide in-patient care for eligible Indians.

There are IHS-operated clinics on Fort Peck, Flathead, Northern Cheyenne, and Rocky Boy's Reservations. The Rocky Boy's clinic also serves Indians living in Havre and Great Falls.

Does the IHS provide health care services off a reservation, other than contracted care?

Yes. In 1976, Congress passed the Indian Health Care Improvement Act to address the health and medical needs of the large number (over 50% of the total Indian population) of Indians residing in the nation's urban areas. Urban Indian health programs are generally operated by the urban Indian community under contract with the IHS. These programs also receive funding from other federal sources, as well as state and private sources. The programs generally consist of out-patient care, preventive services, and health education.

There are currently five urban Indian health programs in Montana. They are located in Helena, Billings, Miles City, Butte, and Great Falls.

What health care services do states provide to Indians?

Medicaid is the only general health program that the states provide to their citizens. Other state-operated specialized health programs include chemical dependency and

substance abuse and mental health. Indians are eligible for Medicaid and the other programs to the same extent as other citizens. Many counties and cities offer free health services in certain situations, and Indians have an equal right to receive them. The IHS contracts with some state and local health care facilities to provide health services to Indians.

What social service programs does the federal government administer for Indians?

The BIA operates general assistance and aid to dependent children programs for Indians who live on a reservation or near a reservation and who maintain close social and economic ties with the tribe. However, these programs are designated a "last resort". In order to receive aid from the BIA programs, an Indian must prove ineligibility for similar assistance from state, local, or other federal welfare agencies or reside in an area where comparable assistance is not available.

Tribal organizations are eligible to participate in the Department of Agriculture's commodity food program.

What social service programs do the states administer for Indians?

Most social service programs administered by states are funded primarily by the federal government. The two most important are the food stamp program and the programs created by the Social Security Act of 1935: Aid to Families With Dependent Children, Supplemental Security Income, and Child Welfare Services. Indian are entitled to participate in these programs to the same extent as all other citizens.

Many states and some local governments operate their own assistance programs that are not federally funded. Indians are eligible for this assistance to the same extent as other citizens. Indians cannot be forced to seek assistance from a federal program before qualifying for state or local government programs.

What social service programs do the tribes administer?

Tribes may operate federal assistance programs on their reservations--for example, the food stamp and the commodity food programs. Tribes are also authorized to administer the BIA assistance programs. Some tribally funded social services include burial expenses, emergency assistance, food and clothing distribution, and assistance with utility bills.

Indian tribes also have substantial authority regarding foster care placement and adoption of Indian children under the Indian Child Welfare Act of 1978.[2]

What is the Indian Child Welfare Act?

The Indian Child Welfare Act (ICWA) of 1978 is a federal law that protects Indian children and preserves the integrity of Indian tribes by restricting state courts' powers to place Indian children in nonparental custody, whether the placement is voluntary or involuntary on the part of the parents.

Why was the ICWA enacted?

The ICWA was enacted to stem the high rate of removal of Indian children from their families and their placement in non-Indian foster care, adoptive homes, and institutions. The ICWA does not apply to custody in a divorce proceeding or to the placement of a juvenile for an act that, if committed by an adult, would be a crime. The purpose of the ICWA is to protect Indian children and to promote the stability and security of Indian tribes and families.

How does the ICWA work?

The most important provision of the ICWA is the determination of jurisdiction in child custody proceedings. If the Indian child resides on a reservation, the tribal court on that reservation has jurisdiction. If the Indian child resides off the reservation, the state court shall, upon petition by either parent, the Indian custodian, or the Indian tribe, transfer the case to the tribal court. The state court may retain jurisdiction if either parent objects to the transfer, if the state court finds good cause for retaining jurisdiction, or if the tribal court declines the transfer. If the state court retains

jurisdiction, the Indian custodian and the Indian tribe have the right to intervene in the court proceeding at any point.

Other important provisions of the ICWA include:

- notification to the Indian custodian and Indian tribe of any involuntary state court proceeding involving an Indian child;
- accordance of full faith and credit by state and federal courts to tribal laws and tribal court decisions involving Indian child custody;
- establishment of preferences for an Indian child's extended family or Indian home and institutions in adoptive or foster care placements; and
- authorization for agreements between states and Indian tribes regarding the care and custody of Indian children and jurisdiction over child custody proceedings.

Who is an "Indian child" for purposes of the ICWA?

According to the ICWA, an Indian child is an unmarried person under the age of 18 who either is a member of an Indian tribe or is eligible for membership and is the biological child of a member.

ENDNOTES

1. 25 U.S.C. § 450(g) and (h).

2. 25 U.S.C. §§ 1901 through 1963.

NATURAL RESOURCES AND ENVIRONMENTAL REGULATION

The seven Indian reservations in Montana compose approximately 8.3 million acres, or 9% of the land area in the state. The physical resources under tribal government jurisdiction are diverse and vary considerably in value. Resource policy is a major area of decisionmaking for tribal governments. It also may involve state-tribal negotiation and cooperation over such matters as quantification of water rights and fish and wildlife management. The economic exploitation of natural resources holds promise for some tribal nations, but it also raises conflicts with religious values and environmental concerns. The decision to exploit tribal resources or to leave the land intact is an ongoing debate in Indian country, as it is in other parts of Montana and the West. There is broad agreement that natural resource development should not be undertaken as an end in itself, but rather as part of a larger plan of social and economic development.

Who is responsible for enforcing federal environmental laws in Indian country?

In recent years, Congress has delegated to states the authority to monitor and enforce federal environmental laws in the non-Indian setting. Since the 1980s, Congress has recognized tribal governments as the appropriate authority to perform some of these functions in Indian country. For example, tribal governments are now eligible for grants to fund waste water treatment and to plan and operate their own regulatory programs.

The Indian policy of the U.S. Environmental Protection Agency (EPA) is intended to implement the executive Indian policy that tribal nations be approached on a government-to-government basis.

Under the policy, the EPA is committed to the close involvement of tribal governments in making decisions, setting standards, managing environmental programs, and implementing laws. The agency encourages tribal governments to assume responsibilities delegated to them in much the same manner as responsibilities are delegated to states. The EPA also encourages cooperation

between state, tribal and local government authorities to address problems that are seldom confined within jurisdictional boundaries.

Who is responsible for managing pollution problems on Indian reservations in Montana?

The federal government has fiduciary obligations regarding Indian natural resources, as well as primary responsibility for pollution prevention and cleanup in Indian country. However, tribal administration and enforcement agencies generally work closely with federal officials. Tribal governments are increasingly involved in combating pollution and managing their resources through comprehensive planning and enforcement systems.[1]

The Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act contain provisions allowing tribal governments to carry out certain functions. For example, 1987 amendments to the Clean Water Act provide that qualified tribal governments must be treated as states (T.A.S.) in the implementation of water pollution prevention programs affecting lakes and streams. Tribal governments are treated as governments for the purposes of the EPA's "Superfund" program to repair damages resulting from hazardous wastes.

So far, no tribal government has been granted T.A.S. status in administering the Clean Air Act. However, the Flathead Tribes have established air quality standards for the Mission Mountains wilderness area, and the Northern Cheyenne have also established federally recognized pristine air quality standards for their entire reservation.

Tribal governments must apply to the EPA to gain T.A.S. status. In order to stay alert to overlapping jurisdiction and other issues that arise between tribal governments and other public authorities, the EPA allows state and local governments to review and comment on tribal government applications, but they may not exercise veto power.[2]

Federal courts have held that states possess no jurisdiction over the reservation environment because Congress has not explicitly consented to state authority in federal environmental laws. The state's role is circumscribed by the primacy of federal law and the trust relationship that the federal government has with tribal governments. Cooperation is increasing, however, in response to the practical requirements of environmental management. For example, the Assiniboine and Sioux Executive Board at the Fort Peck Reservation has entered into a cooperative agreement with the state Department of Health and Environmental Services to address the problem of leaking underground storage tanks.

What is the "Winters Doctrine", and how does it apply in Montana?

Western water law is based on the prior appropriation principle, which holds, in simple terms, "first in time, first in right".

Near the turn of the century, a member of the Fort Belknap Reservation complained to federal authorities that a non-Indian (Winters) living upstream from the reservation was illegally diverting water from the Milk River. The government sued, arguing that under federal law, certain tribal rights to land and water resources are not granted to the tribe by the United States, but rather retained ("reserved") by the tribe because of the tribe's status as a sovereign entity. In 1908, the U.S. Supreme Court held in its Winters decision that when Congress established Indian reservations, it also reserved enough water to fulfill the purpose of the reservation, which at the time was generally considered to be settlement through agriculture.[3] The priority date for Indian reserved water rights is the date on which the reservation was established. Another important principle of the Winters decision, and one which distinguishes Indian water rights from others, is that Indians have vested rights whether they are used or not--nonuse of the reserved rights does not lead to their forfeiture. The Winters decision also held that water use over time may be expanded to meet the needs of the tribe.

Federal courts have denied state regulatory authority over non-Indian water use on fee land in situations in which the stream is entirely within the reservation

boundaries. Once an Indian water right has been quantified, the water can be used for any purpose that the tribal government decides on, such as fisheries and other instream uses, not just agriculture.

Under the 1952 McCarran Amendment,[4] state courts have jurisdiction to adjudicate Indian water rights held in trust by the United States. In a 1983 decision, the U.S. Supreme Court reaffirmed its position that most Indian water rights disputes must be adjudicated in state courts. This provided impetus to negotiations between the state and several of the Indian nations in Montana.

What is the role of the Reserved Water Rights Compact Commission in relation to Indian water rights?

The Compact Commission was created by the Legislature in 1979 for the purpose of concluding agreements with tribal governments (as well as with federal agencies with reserved water rights) and minimizing the loss of rights to non-Indian claimants. The State of Montana entered into a compact with the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in 1985. The compact determines "finally and forever" tribal rights to the water "on, under, adjacent to, or otherwise appurtenant to" the Fort Peck Reservation (section 85-20-201, MCA). The Fort Peck Tribes waived their reserved rights claims in return for consumptive rights to specified quantities of water from the Missouri River and several of its tributaries. Under the compact, the water may be used for any purpose. A limited amount may be marketed to non-Indians off the reservation, subject to state law. The tribal government is authorized to promulgate water codes, subject to the approval of the Secretary of the Interior. The Fort Peck compact is unique in that it was the first one negotiated by the Compact Commission and the first of its kind in the United States.

After a decade of negotiations, a compact involving the Northern Cheyenne, the state, and the federal government was concluded in 1993. Under the terms of the compact, the Department of the Interior and the state agree to repair and raise the elevation of the Tongue River Dam and Reservoir. When the renovation is complete,

the Northern Cheyenne will be able to increase their water storage capacity by an additional 20,000 acre-feet annually. Approximately 91,000 acre-feet from several creeks and the reservoirs are also reserved to the tribal nation.

The Compact Commission has engaged in on-and-off talks with the Blackfeet over the past decade. Recently, the Blackfeet have chosen to consider seeking quantification of their rights through litigation instead of through a negotiated compact. A compact with the Rocky Boy's Reservation is being negotiated, and negotiations with the Crow may proceed in 1995.

Are non-Indians legally obligated to obtain tribal licenses to hunt and fish on Indian reservations?

Yes. The tribe has power to license hunting and fishing by non-Indians on reservation lands held in trust for the tribe or individual Indians.[5] Indians may hunt and fish in Indian country without having to obtain a state permit.

In the 1981 Montana v. United States case,[6] however, the U.S. Supreme Court held that a tribe had no power to regulate non-Indian hunting and fishing on fee lands owned by non-Indians within the reservation. In ruling against the Crow Tribe, the Court noted that no allegations had been raised that the non-Indian activities on fee land threatened the Crow Tribe's welfare, that the State of Montana had abdicated its conservation responsibility, or that the state's regulation interfered with tribal hunting and fishing rights. Despite ruling against tribal regulation, the Court acknowledged that tribes may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

On the Flathead Reservation, however, the Confederated Salish and Kootenai Tribes historically have always managed fish and wildlife resources throughout the reservation. As early as 1936, the tribal government established regulations; sold permits; employed professional biologists, technicians, and game wardens; and

spent hundreds of thousands of dollars on resource and wildlife management activities, habitat improvement, law enforcement, and research.

In 1990, the tribes and the State of Montana entered into a historic agreement under the State-Tribal Cooperative Agreements Act to cooperatively manage bird hunting and fishing on the Flathead Reservation. The agreement simplified regulations and licensing requirements for hunters and anglers and established a framework to cooperatively manage fish and game bird resources on the reservation. The State-Tribal Cooperative Agreements Act was recently renewed without incident.

ENDNOTES

1. See "Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments: A Concept Paper, Environmental Protection Agency, Washington, D.C. (1991).

2. See "Tribes as States: Indian Tribal Authority to Regulate Federal Environmental Laws and Regulations", Loursen, David E., Environmental Law Reporter (Sept. 1993).

3. Winters v. United States, 207 U.S. 564 (1908).

4. 43 U.S.C. § 666(a).

5. Montana v. United States, 450 U.S. 544 (1981); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

6. See 450 U.S. at 566.

TAXATION

Do Indians pay taxes?

Yes. Depending on the specific residency and employment circumstances and on the status of the specific property, Indians are subject to most of the same tax laws that non-Indians are. However, there are some exemptions.

What are some of the tax exemptions granted to Indians?

The following exemptions from federal income tax have been granted to Indians:

- federal money received as compensation for the taking of property;
- income earned directly from an Indian's trust allotment; and
- income earned from an allotment received as a gift or by exchanging other land for it.

Indians are exempt from paying estate taxes on an inherited allotment.

Income from land that has been removed from trust and on which a fee patent has been issued is taxable. Reinvestment income is also taxable, even if the original investment was derived from nontaxable income.

States cannot tax Indian trust lands held tribally or in allotments. However, a recent court case, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992), held that a state may tax fee land owned by a tribe or by an individual Indian.

States cannot tax income earned on a tribe's reservation by tribal members, nor can a state assess a sales tax on transactions entered into by Indians on their reservation. Indians on a reservation are also exempt from personal property taxes. A state can charge a registration fee on an automobile owned by an Indian on a reservation, but cannot levy a personal property tax on the automobile. However, states can require tribes to collect state taxes on the reservation and pass them on

to the state if the taxes are not on products manufactured by the tribe or produced with tribal resources. An example is a state tax on cigarettes sold to non-Indians on a reservation.

Tribal governments are generally exempt from federal taxation in the same way that state and local governments are exempt. Two noticeable exceptions to this rule are Social Security and unemployment compensation taxes. While state and local governments are exempt from paying these taxes, tribal governments are not.

States cannot tax the income of tribal governments.

Can a state refuse to provide services to reservation Indians because they are exempt from most state taxation?

No. Indians are state citizens and are entitled to the full rights and privileges as a result of that citizenship. Exemptions from taxation are based on federal statutes and treaties that protect Indians and their property. The protection was given in exchange for vast amounts of Indian land. In other words, Indians paid for their tax immunities when they agreed to give up their land.

Are nonmember Indians entitled to the same state tax exemptions?

Indians residing on a reservation other then their own are probably not entitled to state tax exemptions.

Do non-Indians on reservations pay state taxes?

Generally yes, if the subject matter of the tax is not preempted by federal law and if the tax does not substantially interfere with tribal sovereignty. However, very few state taxes violate federal law or interfere with tribal government. Therefore, non-Indians have to pay most state taxes on a reservation.

Can an Indian tribe tax its members?

Yes. The power to levy taxes is an inherent right of any government. Tribal governments can impose the same taxes on its citizens as federal and state

governments can. In the past, tribal governments have been reluctant to levy taxes against tribal members. Also, some tribal constitutions prohibit or limit tribal taxation. However, because the right to tax has not generally been exercised by Indian tribes does not mean that the right does not exist.

Can an Indian tribe tax nonmembers, including non-Indians, residing on its reservation?

Yes. If non-Indians enter a reservation for the purpose of engaging in economic activity, they are subject to tribal taxation. Some non-Indians may argue that tribal taxation constitutes "taxation without representation" because non-Indians are not eligible to vote in tribal elections. However, there are numerous instances in which people pay state or federal taxes but cannot participate in elections--for example, residents of one state who pay sales taxes on purchases in another state or legal immigrants who pay state and federal income taxes. A person's ineligibility to participate in elections does not deprive a government of the right to tax that person.

Can a state and an Indian tribe both impose a tax on the same activity?

In a recent case, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), the U.S. Supreme Court upheld a New Mexico state tax on oil and gas produced from tribal lands by a non-Indian company, even though the company was also paying tribal taxes on the same activity. Therefore, it appears that dual taxation is possible, at least in the area of mineral production.

It is important to note that the rule of law today regarding Indian taxation, with the exception of trust property, may not be the rule tomorrow. Indian taxation questions are generally settled in courts of law, especially the U.S. Supreme Court. It is impossible to make definitive statements about what is or is not allowed in the area of Indian taxation. A court decision in one instance regarding taxation may not apply to another similar instance.

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